TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 148.

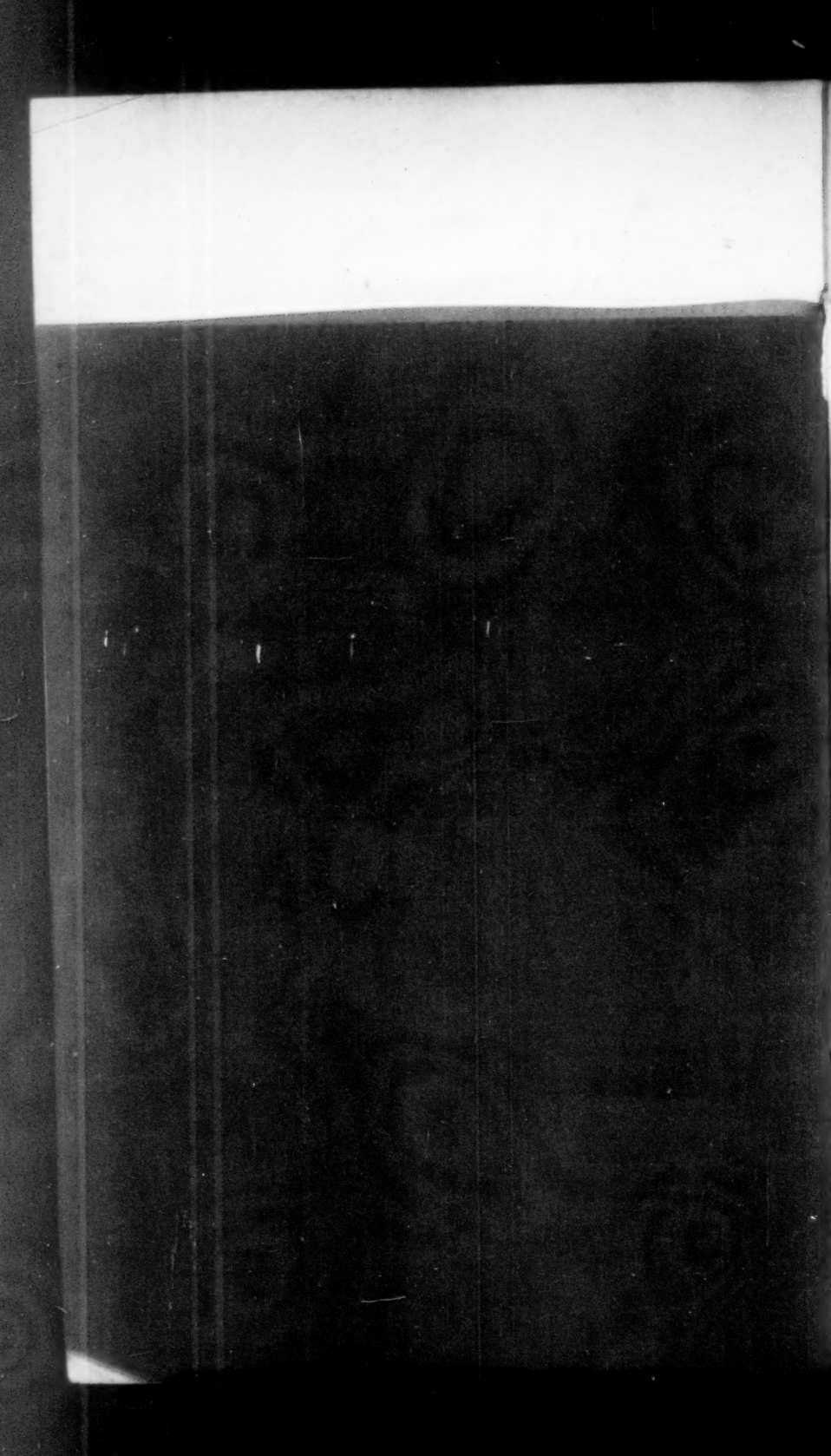
ELIJAH M. DUNPHY, APPELLANT,

vs.

T. H. KLEINSCHMIDT AND CHARLES E. DUER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED DECEMBER 11, 1869.



SUPREME COURT OF THE UNITED STATES.

No. 352.

ELIJAH M. DUNPHY, APPELLANT,

vs.

T. H. KLEINSCHMIDT AND CHARLES E. DUER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

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Judge 93

1 In 3rd judicial district court, Lewis and Clark County, Montana Territory.

THEODORE H. KLEINSCHMIDT ET AL., PL'FFS,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, and Elijah M. Dunphy, def'd'ts. } In equity.

In the territorial district court, 1st judicial district, Gallatin County, Montana Territory.

Be it remembered that, on the 30th day of April, 1868, in the county of Gallatin, in the 1st judicial district aforesaid, the plaintiff filed with the clerk of said court the complaint herein, of which in words and figures the following is a copy, to wit:

2 THEODORE H. KLEINSCHMIDT, PL'FF,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, and Elijah M. Dunphy, def'ts. } In equity.

In the territorial district court, 1st judicial district, Gallatin County, Montana Territory.

And now comes the plaintiff in the above cause, by Woolfolk & Toole & Pemberton, his attorneys, and on behalf of himself and all other judgment creditors of the defendant, Benajah Morse, surviving partner of the late firm of E. & B. Morse, whose executions have been returned unsatisfied, and who may choose to come in and contribute to the expenses of this suit, shows to the hon. court that heretofore, to wit, on the twelvth day of March, A. D. 1868, this plaintiff recovered a
3 judgment in an action in the district court of the 3d judicial district of Lewis & Clark County, Montana Territory, against the defendants, Benajah Morse, as surviving partner of the late firm of E. & B. Morse, for the sum of ($16,957 50) sixteen thousand nine hundred & fifty-seven dollars and fifty cents, as appears by the judgment-roll and proceedings on file in the office of the clerk of the said court, said judgment being upon a promissory note executed by the firm of E. & B. Morse. (A copy of said judgment is herewith filed, marked Exhibit "A," and made a part of this complaint.)

Plaintiff further states that afterwards, to wit, on the 19th day of March, A. D. 1868, an execution was duly issued out of and under the seal of said court upon the aforesaid judgment and against the property of the said Benajah Morse, surviving partner as aforesaid, and said ex-
ecution was directed to the sheriff of Gallatin County, the plaint-
4 of residence of the said defendant, and by the terms of s extent of
cution the said sheriff was commanded that, on the pers atisfied, as
erty of the said Benajah Morse, surviving partner as a good and
should make or cause to be made the said judgment, inte nd levy.
and, if said personal property found in his county sho orse is now the
to satisfy the same, that he should make or cause to Morse, and that as
said amount out of any real property belonging t aid Dunphy, he is run-
make due & lawful returns of said execution. gaged property, and con-
and return thereon is herewith filed, and effectually place the same
made a part of this complaint.) late firm of E. & B. Morse

Plaintiff further states that a transcript of the aforesaid judgment was duly filed with the county recorder of Gallatin County, as required by law.

Plaintiff further states that, after said transcript had been recorded as aforesaid, to wit, on the 2nd day of April, A. D. 1868, the said sheriff of Gallatin County returned said execution to the clerk of the district court of Lewis & Clark County aforesaid wholly unsatisfied, as appears by the copy of the said execution and sheriff's return thereon herewith filed, the original execution and return being now on file in the office of the clerk of the aforesaid court.

Plaintiff further states that the whole amount of the aforesaid judgment is still unpaid and unsatisfied, and that the total amount thereof, with interest, is still due to the plaintiff from said Benajah Morse, surviving partner as aforesaid.

Plaintiff further states that on the 31st day of October, A. D. 1867, the said Benajah Morse, together with his brother, Elkana Morse, executed and delivered to E. M. Dunphy an instrument of writing purporting to be a mortgage. (A copy of which said instrument is herewith filed, marked Exhibit "C," and made a part of this complaint.

Plaintiff further states that said mortgage purports (as plaintiff is informed and believes) to be executed for the purpose of securing an indebtedness of thirty thousand dollars due and owing from the said Benajah and Elkana Morse to the said E. M. Dunphy, although the record thereof only mentions an indebtedness of three thousand dollars.

Plaintiff further states that the following property is embraced in said mortgage, to wit; a ranch in the county of Gallatin, known as the Morse ranche, and containing six hundred and forty acres of land, together with two-thirds of the crops then growing and being on said ranche at the time said mortgage was executed, and all crops harvested and gathered therefrom, said ranche and crops being of at least the value of seven thousand dollars; also all the stock belonging to said ranch, which said plaintiff is informed and believes was of the value of five thousand dollars; that said mortgage also embraced all the goods, wares, and merchandise there in Morse's store, in Gallatin County, together with the lot and storehouse, being worth at least twenty-five thousand dollars; that said mortgage further embraced two hundred and twenty-five head of cattle, and all the book accounts and evidences of indebtedness due to the said E. & B. Morse from all persons whomsoever, which said cattle, book accounts, and evidences of indebtedness the plaintiff is informed, and charges the fact to be, were worth, at a low estimate, the sum of thirty thousand dollars.

Plaintiff further states that the said property, embraced in the said mortgage at the time of the execution thereof, was at least of the value of seventy thousand dollars, as plaintiff is informed and believes, and charges the fact to be.

Plaintiff further states that at the time of the execution of the said mortgage, the said Benajah and Elkana Morse were indebted to William Herron in the sum of eight thousand dollars, including costs of suit, and that under their firm name of E. & B. Morse, they were indebted to the firm of Erfort & Petring, in St. Louis, Mo., in the sum of over sixteen thousand dollars, which indebtedness was afterwards assigned & transfered to this plaintiff, and for which the above-described judgment was obtained by plaintiff against Benajah Morse, as surviving partner of the firm of E. & B. Morse.

Plaintiff further states that the said Benajah & Elkana Morse, at

the time of the execution of said mortgage, were also indebted under their firm name of E. & B. Morse, to the firm of Appleton, Noyes, & Co. and W'm Young & Co., both mercantile firms in Saint Louis, Missouri—said indebtedness amounting at the time aforesaid to the aggregate sum of fifteen thousand dollars; and at the time aforesaid E. & B. Morse were also indebted (as plaintiff is informed and believes, and charges the fact to be) to divers other persons to this plaintiff unknown.

Plaintiff further states that the aforesaid mortgage was made by the said Benajah and Elkana Morse with the intent to hinder, delay, and defraud the creditors of the said E. & B. Morse; that said mortgage was not accompanied by any imediate or continued change of possession of the said property conveyed, but, on the contrary, the said E. & B. Morse continued to occupy the said storehouse, and sell and dispose of the goods therein long after said mortgage was executed, and applied the proceeds thereof to their own benefit, and that the said E. M. Dunphy did not take the possession or control of any part of said property for several months after the said mortgage was executed.

Plaintiff further charges the fact to be that the said E. & B. Morse were not indebted to the said E. M. Dunphy in the sum of thirty thousand dollars; nor were either Benajah or Elkana Morse indebted to the said E. M. Dunphy in any such amount at the time of the execution of the said mortgage, but plaintiff charges that both the said Dunphy and the said E. & B. Morse have admitted to divers persons that such pretended indebtedness was fictitious, and that there was only an actual indebtedness of six or seven thousand dollars due, or to become due, from the said E. & B. Morse, or either of them, to the said E. M. Dunphy, which indebtedness was really, by agreement between the parties, to be paid in flour, delivered to the said Dunphy in Helena City, M. T., by the said E. & B. Morse; and plaintiff further charges that both E. & B. Morse and E. M. Dunphy have confessed and acknowledged to divers persons that said mortgage was in reality executed to hinder, delay, and defraud the creditors of the said E. & B. Morse in the collection of their just demands, and not for the purpose of securing any bona-fide indebtedness due, or to become due, to the said E. M. Dunphy.

Plaintiff further charges that by means of said fraudulent mortgage, and the fictitious indebtedness therein mentioned, the said E. M. Dunphy has actually prevented this plaintiff and other judgment creditors of the said E. & B. Morse from collecting their just demands; that under and by virtue of the said mortgage he has claimed the title to the property embraced therein, and has forbidden the sheriff of Gallatin County to levy plaintiff's execution on any of said property, and that the said sheriff, thus forbidden by the said Dunphy, has refused to make a levy on said property of the execution of plaintiff's and of other judgment creditors of E. & B. Morse, to the extent of thirty-five thousand dollars, but has returned the same unsatisfied, as above stated, although the said plaintiff tendered to him a good and sufficient bond of indemnity to protect him in making said levy.

Plaintiff further states that the said Benajah Morse is now the sole surviving partner of the late firm of E. & B. Morse, and that as such surviving partner, in conjunction with the said Dunphy, he is running off and disposing of the aforesaid mortgaged property, and converting the same into proceeds so as to effectually place the same beyond the reach of the creditors of the late firm of E. & B. Morse

13 that the plaintiff has no remedy at law, and will loose the entire judgment aforesaid, unless aided by the remedial power of a court of equity, and unless the said defendants are prevented from further disposing of the property embraced in said mortgage.

Plaintiff further states that, by the reason of the premises aforesaid, the said E. M. Dunphy is liable to him, and the other judgment creditors whose executions have been returned unsatisfied in consequence of his said fraudulent mortgage, and that such unsatisfied executions amount, as above stated, to the sum of thirty-five thousand dollars, or thereabouts.

Plaintiff further states that he is informed and believes, and charges the fact to be, that the said E. M. Dunphy, in conjunction with Benajah Morse, has already converted the greater part of said mortgaged property into money and proceeds, and that the said Dunphy has already realized more than thirty thousand dollars from the said mort-
14 gaged property, unless the same has been paid over by him to the said Benajah Morse.

Plaintiff further states that the said Benajah Morse is wholly irresponsible, and that there is no property or assets belonging to the said firm of E. & B. Morse, or either of them, except what is embraced in the aforesaid mortgage.

Plaintiff further states that E. M. Dunphy has not sufficient property other than the property embraced in the aforesaid fraudulent mortgage, out of which the executions of plaintiff and the other judgment creditors could be satisfied, and that unless the remainder of the said property embraced in the said mortgage can be reached and applied to the payment of the said judgment of plaintiff, the same will remain unpaid.

Wherefore this plaintiff prays judgment that said mortgage be adjudged and decreed to be fraudulent and void as against this plaint-
15 iff, and such other judgment creditors of Benajah Morse, surviving partner of the late firm of E. &. B. Morse, as shall elect to come in and share the expenses of this action; that a receiver of all the property and effects belonging to the late firm of E. & B. Morse be appointed, with authority to take such property wherever found, and hold the same subject to the order of the court, and that the defendants, their agents, servants, and employees, in the mean time be restrained and enjoined from disposing of any of said property, or paying out any of the proceeds thereof, or in any wise interfering therewith, and that said receiver pay out of the proceeds of such property the judgment aforesaid, and the costs and expenses of this action; and that if the said proceeds are insufficient to pay the said judgment of plaintiff, together with interest and costs, that plaintiff have judgment and execu-
16 tion against the said E. M. Dunphy for the residue thereof remaining unsatisfied, and for such other and further relief as to the hon. court may seem just and proper.

WOOLFOLK, PEMBERTON & TOOLE,
Attorneys for Pl'ffs.

T. H. Kleinschmidt, the above plaintiff, being first duly sworn, deposes and says that he has heard the foregoing complaint read, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

T. H. KLEINSCHMIDT.

Subscribed & sworn to before me this 22nd day of April, 1868.

[L. S.] JAMES E. OWINGS,
Notary Public.

Exhibit "A."

17 THEODORE H. KLEINSCHMIDT, Pl'ff,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, def'ts.

In the territorial district court, 3 judicial district, Lewis & Clark County Montana Territory, March term, A. D. 1868.

In this action, the defendant having been regularly served with process requiring him to appear and answer the complaint herein of the plaintiff in the above cause, at the court-house in Helena, Montana Territory, on the first Monday in March, A. D. 1868, and whereas the said defendant, by his attorney, George May and William Chumasero, (after having regularly appeared and plead to said action,) did, on the 12th day of March, A. D. 1868, file their stipulation in writing in the above cause withdrawing all pleas and defences therein, and agreeing
18 to make no objection to the taking of judgment therein, and the default of the said defendant in the premises having been duly entered according to law; therefore, upon application of said plaintiff to the court, judgment is hereby entered against the said defendant in pursuance of the prayer of said complaint.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that the said plaintiff do have and recover from the said defendant the sum of ($16,880 00) sixteen thousand eight hundred and eighty dollars, with interest thereon at the rate of ten per cent. per annum from the date hereof till paid, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of seventy-seven & $\frac{55}{100}$ dollars.

Judgment rendered March 12th, 1868.

Damages	$16,880 00
Sheriff's costs	57 50
Clerk's do.	20 00

19 Clerk's office of the district court of the 3d judicial district of Montana Territory, in & for the county of Lewis & Clark, ss:

I, the undersigned, clerk of the said court, do hereby certify that the foregoing to be a true and correct copy of the judgment entered in the above-entitled cause.

Attest my hand, and the seal of said court affixed, this 12th day of March, A. D. 1868.

[L. S.] CHA'S W. FOWLER, *Clerk.*

Exhibit "B."

In the district court of the third judicial district of the Territory of Montana, in & for the county of Lewis & Clark.

To the people of the United States of the Territory of Montana to the sheriff of the county of Gallatin, greeting:

Whereas on the 12th day of March, A. D. 1868, Theodore H.
20 Kleinschmidt recovered a judgment in the said district court of the third judicial district of the Territory of Montana, in and for the county of Lewis & Clark, against Benajah Morse, surviving partner

of the late firm of E. & B. Morse, for the sum of sixteen thousand eight hundred & eighty $\frac{00}{100}$ dollars damages, with interest at the rate of ten per cent. per annum till paid, together with his costs and disbursements at the date of said judgment and accruing costs, amounting to the sum of seventy-seven $\frac{50}{100}$ dollars, as appears to us of record:

And whereas the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court in the county of Lewis & Clark, and the said judgment was docketed in said clerk's office in the said county on the day and year first above written, and
21 the sum of $16,957 50, with interest, is now (at the date of this writ) actually due on said judgment:

Now you, the said sheriff, are hereby required to make the said sums due on the judgment out of the personal property of said debtor; or if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to him, on the day whereon said judgment was docketed in the said county, or at any time thereafter, and make return of this writ within sixty days after your receipt hereof, with what you have done endorsed hereon.

Witness Hon. Lyman E. Munson, judge of the said third judicial district of the Territory of Montana, at the court-house, in the county of Lewis and Clark, this 19th day of March, A. D. 1868.

Attest my hand and the seal of said court the day & year last above written.

[L. S.] CHA'S W. FOWLER, *Clerk.*

22 Endorsed on the foregoing execution is the following:

District court, 3 judicial district, county of Lewis & Clark. Theodore H. Kleinschmidt, plaint'ff, against Benajah Morse, defendant. Execution. Filed April 22d, 1868. Cha's W. Fowler, clerk. Woolfolk, Pemberton & Toole, attorneys for pl'ff. Levy, $16,880 00, damages; 57 50, sheriff's costs; 20, clerk's do.; , accruing interest.

GALLATIN COUNTY, M. T.,
April 17th, A. D. 1868.

This execution returned unsatisfied. No property found in this county on which to levy.

Witness my hand this 17th day of April, A. D. 1868.
Gallatin county, M. T.

JOHN C. GAY, *Sheriff.*
By JOHN W. MOFFIT, *Deputy Sheriff.*

The within execution came into my hand April 3d, 1868.

JOHN C. GAY,
Sheriff, Gallatin County, M. T.

23 I certify that the above is a true copy of the original execution now on file in the clerk's office of the 3d judicial district, Lewis & Clark county, M. T.

JAMES E. OWINGS, *Notary Public.*

Exhibit "C."

This indenture, made and entered into this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-seven, between B. Morse and E. Morse, of Gallatin County, Montana Territory, of the first part, and Elijah M. Dunphy, of Edgerton county, in

the Territory aforesaid, of the second part, witnesseth that the said parties of the first part, in consideration of the sum of thirty thousand dollars to them in hand paid by the said party of the second
24 part, the receipt of which is hereby acknowledged, have granted, bargained, sold, and conveyed, and by the presents do grant, bargain, sell, and convey, unto the said party of the second part, and to his heirs and assigns, forever, all of the following described property, to wit:

A certain ranche situated in the Gallatin Valley, in Gallatin County, in said Territory, known as Morse's ranche, and containing six hundred and forty (640) acres, together with the undivided two-thirds part of all the crops now growing and being thereon; and also all crops harvested and gathered therefrom, and the stock belonging on said ranche; also the store and lot situated in Gallatin Valley, and known as More's store, with all goods, wares, and merchandise now therein, and the books, accounts, and all evidences of indebtedness due to said parties of the first part from any and all persons whomsoever; also two
25 hundred and twenty-five head of cattle, now owned by, and in the possession of, said first parties in said Gallatin County; also ten head of horses and colts, and two jacks; also twelve mules, with their harness; also four saddles; also five wagons; also the undivided half of one threshing-machine; also one hundred tons of hay; also three hundred bushels of wheat, now at the Madison Mills, in said Gallatin County; also one reaper and mower—all of the aforesaid property now being in possession of said first parties in the said county of Gallatin; also six horses and colts in Summit City, in the county of Madison, in said Territory of Montana, the appurtenances to said property, or any of the same belonging and appertaining: To have and to hold
26 the same, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever. And the said parties do hereby covenant to and with said second party, that they have title to all the above-mentioned property, and have good right to sell and convey the same; that it is clear from incumbrances; and that they will warrant and defend the title thereto to said second party, his heirs and assigns, forever: Provided always, and these presents are upon this express condition, that if said parties of the first , their heirs and assigns, shall well and truly pay, or cause to be paid, to said party of the second part, or his assigns or personal representatives, the just and full sum of three thousand dollars in twelve months from the date hereof, according to the condition of a certain promissory
27 note, bearing even date herewith, given by said first parties to said second party, then this instrument to be void; otherwise to remain in full force and effect. But in case of default of the payment of said sum of money with the interest thereon, or any part thereof, according to the tenor and effect of said note when the same shall by its terms become due and payable, the said second party, after having advertised said sale for twenty days in a newspaper published in Edgerton County, or by posting notices in four public places in said Gallatin County, may sell the said property, or any part thereof, at public auction, to the highest bidder for cash, at the place mentioned in said advertisement, and, making said sale as the attorney of said first parties for that purpose hereby constituting, irrevocable, or in the name
28 of the second party, shall execute deeds of the property so sold to the purchaser thereof, and from the proceeds of such sale shall pay the expenses of advertising, selling, and conveying as aforesaid, and including attorney's fees, (2,) the amount then due on said note, principal and interest; and (3) render the overplus, if any, to said parties of the first part, at the office of said second party, in Helena. And it is

further agreed between the parties that, until default be made in the payment aforesaid, it shall and may be lawful for said first parties, and they are hereby authorized, to retain, keep possession, and carefully use, all of the said property above herein described. And it is further agreed that if said parties of the first part shall sell or dispose of said property, or any part thereof, without the consent of said second
29 party, or if, at any time prior to the maturity of said note, said second party shall be of opinon that the longer retention of said property by said first parties would endanger his security, it shall and will be lawful for said second party, at any time after this date, to take possession of the same, or any part thereof, and hold the same for security for the payment of said note until its maturity.

Whereof the said first parties have hereunto set their hands and seals the day and year first above written.

BENAJAH MORSE. [SEAL.]
ELKANA MORSE. [SEAL.]

Witness: W'M CHUMASERO.

TERRITORY OF MONTANA, *County of Gallatin, ss:*

On this 5th day of November, A. D. (3 p. m.) 1867, before me, the undersigned, personally came E. Morse and B. Morse, to me per-
30 sonally known to be the persons described in and who executed the foregoing instrument, and acknowledged that they had executed the same for the usès and purposes therein mentioned.

Given under my hand and official seal the day and year aforesaid.

(Signed) R. P. VIVION, *Recorder Gallatin Co.*

THE TERRITORY OF MONTANA, *County of Gallatin:*

I, Robert P. Vivion, recorder of said county, do hereby certify the above and foregoing is a true and exact copy of an instrument on record of my office on pages 152, 153, & 154 of Book F of the records of said Gallatin County.

In witness whereof I have hereunto subscribed my name and affixed the seal of said county on this first day of January, A. D. 1868.

(SEAL OF GAL- (R. P. VIVION, *Clerk Gallatin County,*
(LATIN COUNTY. (By W'M P. PARSONS, *Dep't.*

31 Endorsed on the foregoing mortgage as follows:
B. Morse & E. Morse to E. M. Dunphy. Copy.

Received for record Nov. 5, 1867, and recorded in Book F, pages 152, 153, and 154 of Book F of the records of Gallatin County.

R. P. VIVION, *Recorder,*
By W'M PARSONS, *Dep't.*

And thereafter, to wit, on the 8th day of June, A. D. 1868, plaintiff filed in said cause amended complaint, of which in words & figures the following is a copy, to wit:

THEODORE H. KLEINSCHMIDT, PL'FF,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, and Elijah M. Dunphy, def'ts.

In equity, in the territorial district court, 1st judicial district, Gallatin County, Montana Territory.

32 And now comes the plaintiff, by Woolfolk, Pemberton & Toole,

his attorneys, and for amended complaint, filed by leave of the court on behalf of himself and all other judgment creditors of the defendant Benajah Morse, surviving partner of the late firm of E. & B. Morse, whose executions have been returned unsatisfied, and who may choose to come in and contribute to the expenses of this suit, shows to the hon. court that heretofore, to wit, on the 12th day of March, A. D. 1868, this plaintiff recovered a judgment in an action in the district court of the 3d judicial district, Lewis & Clark County, Montana Territory, against the defendant Benajah Morse, as surviving partner of the late firm of E. & B. Morse, for the sum of sixteen thousand nine hundred and fifty-seven $\frac{50}{100}$ dollars, as appears by the judgment-roll & proceedings on file in the office of the clerk of the said court, said
33 judgment being upon a promissory note executed by the firm of E. & B. Morse, a copy of said judgment being filed with the original complaint herein, marked Exhibit "A," and made a part of said complaint, and to which reference is hereby made.

Plaintiff further states that afterwards, to wit, on the 19th day of March, A. D. 1868, an execution was duly issued out of, and under the seal of, said court, upon the aforesaid judgment and against the property of the said Benajah Morse, surviving partner as aforesaid, and said execution was directed to the sheriff of Gallatin County, (the place of residence of the said defendant,) and by the terms of said execution the said sheriff was commanded that of the personal property of the said Benajah Morse, surviving partner as aforesaid, he should
34 make, or cause to be made, the said judgment, interest, and costs, and if said personal property found in his county should be insufficient to satisfy the same, that he should make, or cause to be made, the aforesaid amount out of any real property belonging to said defendant, and make due and lawful returns of said execution. (A copy of said execution and return thereon is filed with the original complaint herein, marked Exhibit "B," and made a part of said complaint, and to which reference is hereby made.)

Plaintiff further states that a transcript of the aforesaid judgment was duly filed with the recorder of Gallatin County, as required by law.

Plaintiff further states that after said transcript has been recorded as aforesaid, to wit, on the day of , A. D. 1868, the said sheriff of Gallatin County returned said execution to the clerk of
35 the district court of Lewis & Clark County aforesaid wholly unsatisfied, as appears by the copy of the said execution and sheriff's return thereon, (filed with the original complaint herein,) the original execution and return being now on file in the office of the clerk of the aforesaid court.

Plaintiff further states that the whole amount of the aforesaid judgment is still unpaid and unsatisfied, and that the total amount thereof, with interest, is still due to the plaintiff from the said Benajah Morse, surviving partner as aforesaid.

Plaintiff further states that on the 31st day of October, A. D. 1867, the said Benajah Morse, together with his brother, Elkana Morse, executed and delivered to E. M. Dunphy an instrument of writing
36 purporting to be a mortgage, (a copy of which said instrument is filed with the original complaint herein, marked Exhibit "C," and made a part of said complaint.)

Plaintiff further states that said mortgage purports, as plaintiff is informed and believes, to be executed for the purpose of securing an indebtedness of thirty thousand dollars due and owing from said Bena-

jah & Elkana Morse to the said E. M. Dunphy, although the record thereof only mentions an indebtedness of three thousand dollars.

Plaintiff further states that the following property is embraced in said mortgage, to wit, a ranche in the county of Gallatin, known as Morse's ranche, and containing six hundred and forty acres of land, together with two-thirds of the crops thereon growing and being on said ranche at the time said mortgage was executed, and all crops
37 harvested and gathered therefrom, said ranche and crops being of at least the value of seven thousand dollars; also all the stock belonging to said ranche, which said plaintiff is informed and believes was of the value of five thousand dollars; that said mortgage embraced all the goods, wares, and merchandise then in Morse's store, in Gallatin County, together with the lot and store-house containing the same, said goods, wares, and merchandise, and store-house being worth at least twenty-five thousand dollars; that said mortgage further embraced two hundred and twenty-five head of cattle, and all the book accounts and evidences of indebtedness due to the said E. & B. Morse from all persons whomsoever; which said cattle, book-accounts, and evidences of indebtedness the plaintiff is informed, and charges the fact to be, were worth, at a low estimate, the sum of thirty thousand dollars.

38 Plaintiff further states that the said property embraced in the said mortgage, at the time of the execution thereof, was at least of the value of seventy thousand dollars, as plaintiff is informed and believes, and charges the fact to be.

Plaintiff further states that, at the time of the execution of the said mortgage, the said Benajah and Elkana Morse were indebted to William Herron in the sum of eight thousand dollars, including costs of suit, and that under their firm name of E. & B. Morse they were indebted to the firm of Erfort & Petering, in Saint Louis, Mo., in the sum of over sixteen thousand dollars, which indebtedness was afterwards assigned and transfered to this plaintiff, and for which the above-described judgment was obtained by plaintiff against Benajah Morse, surviving partner of the late firm of E. & B. Morse.

39 Plaintiff further states that the said Benajah & Elkana Morse, at the time of the execution of said mortgage, were also indebted, under their firm name of E. & B. Morse, to the firm of Appleton, Noyes & Co., and W'm Young & Co., both mercantile firms in Saint Louis, Mo., said indebtedness amounting, at the time aforesaid, to the aggregate sum of fifteen thousand dollars; and that, at the time aforesaid, the said E. & B. Morse were also indebted (as plaintiff is informed and believes, and charges the fact to be) to divers other persons to this plaintiff unknown.

Plaintiff further states that the greater part of the property embraced in the said mortgage consisted of accounts, wheat, hay, store goods, cattle, & other perishable property; that the said mortgage, by its terms provided that the said E. & B. Morse might remain in possession
40 and use the said property for the period of one year, or until the maturity of the fictitious indebtedness therein mentioned; and that by its terms the said conveyance clearly manifests that it was made in trust for the use of E. & B. Morse, the persons making the same, and it is consequently void as against this plaintiff and other creditors of E. &. B. Morse.

Plaintiff further states that the aforesaid mortgage was made by the said Benajah & Elkana Morse with the intent to hinder, delay, and defraud the creditors of the said E. & B. Morse; that said Dunphy was

privy to such intent, and accepted such mortgage for the purpose of aiding the said E. & B. Morse to hinder, delay, & defraud their creditors: that said mortgage was not accompanied by any immediate or continued change of possession of the said property conveyed, but, on the contrary, the said E. & B. Morse continued to occupy the said store-house and sell and dispose of the goods therein long after said mortgage was
41 executed, and applied the proceeds thereof to their own benefit; and that the said E. M. Dunphy did not take the possession or control of any part of said property for several months after the said mortgage was executed.

Plaintiff further charges the fact to be that the said E. & B. Morse were not indebted to the said E. M. Dunphy in the sum of thirty thousand dollars, nor were either Benajah or Elkana Morse indebted to the said E. M. Dunphy in any such amount at the time of the execution of the said mortgage; but plaintiff charges that both the said Dunphy and the said E. & B. Morse have admitted to divers persons that such pretended indebtedness was fictitious, and that there was only an actual indebtedness of six or seven thousand dollars due, or to become due, from the said E. & B. Morse, or either of them, to the said E. M. Dunphy, which indebtedness was really, by agreement between the parties,
42 to be paid in flour, delivered to the said Dunphy in Helena City, M. T., by the said E. & B. Morse; and plaintiff further charges that both E. & B. Morse and E. M. Dunphy have confessed and acknowledged to divers persons that said mortgage was in reality executed to hinder, delay, and defraud the creditors of the said E. & B. Morse in the collection of their just demands, and not for the purpose of securing any bona-fide indebtedness due or to become due to the said E. M. Dunphy.

Plaintiff further states that afterwards to wit, on the 3d day of January, A. D. 1868, the said Benajah Morse, surviving partner of the said firm of E. & B. Morse, executed and delivered to the said E. M. Dunphy an assignment of all the property embraced in the aforesaid mortgage, and authorized therein the said E. M. Dunphy to sell and dispose of
43 all the said property having a due regard to his interests and the interest of the creditors of E. & B. Morse, (a copy of said assignment is hereunto annexed, marked Exhibit "D," and made a part hereof;) that after the said assignment was made, the said B. Morse, surviving partner as aforesaid, continued for several months to retain the possession and control of the aforesaid property assigned, and to sell and dispose of the same, and to collect the proceeds thereof; and that such assignment not being accompanied by the immediate delivery, or followed by any actual and continued change of the possession of the property assigned, as required by law, is fraudulent and void as to this plaintiff and the other creditors of E. & B. Morse.

Plaintiff charges that by means of said fraudulent mortgage and the fictitious indebtedness therein mentioned, the said E. M. Dunphy
44 has actually prevented this plaintiff and other judgment creditors of the said E. & B. Morse from collecting their just demands; that under and by virtue of the said mortgage he has claimed the title to the property embraced therein, and has forbidden the sheriff of Gallatin County to levy plaintiff's execution on any of said property; & that the said sheriff, thus forbidden by the said Dunphy, has refused to make a levy on said property of the execution of plaintiff and of other judgment creditors of E. & B. Morse to the extent of thirty-five thousand dollars, but has returned the same unsatisfied, as above stated, although the said plaintiff and other judgment creditors as aforesaid

tendered him a good and sufficient bond of indemnity to protect him in making said levy.

Plaintiff further states that the said Benajah Morse is now the
45 sole surviving partner of the late firm of E. & B. Morse, and that as such sole surviving partner, in conjunction with the said Dunphy, he is running off and disposing of the aforesaid mortgaged property, and converting the same into proceeds so as effectually to place the same beyond the reach of the creditors of the late firm of E. & B. Morse; that this plaintiff has no remedy at law, and will loose the entire judgment aforesaid, unless aided by the remedial power of a court of equity, and unless the said defendants are prevented from further disposing of the property embraced in the said mortgage.

Plaintiff further states that by reason of the premises aforesaid the said E. M. Dunphy is liable to him and the other judgment creditors, whose executions have been returned unsatisfied in consequence of his said fraudulent mortgage, and that such unsatisfied executions
46 amount, as above stated, to the sum of thirty-five thousand dollars, or thereabouts.

Plaintiff further states that he is informed and believes, and charges the fact to be, that the said E. M. Dunphy, in conjunction with Benajah Morse, has already converted the greater part of said mortgaged property into money and proceeds, and that the said Dunphy has already realized more than thirty thousand dollars from said mortgaged property, unless the same has been paid over by him to the said Benajah Morse.

Plaintiff further states that the said Benajah Morse is wholly irresponsible, and that there is no property or assets belonging to the said firm of E. & B. Morse, or either of them, except what is embraced in the aforesaid mortgage.

Plaintiff further states that E. M. Dunphy has not sufficient property, other than the property embraced in the aforesaid fraudulent
47 mortgage, out of which the execution of plaintiff & other judgment creditors could be satisfied, and that unless the remainder of the said property embraced in the said mortgage can be reached and applied to the payment of the said judgment of plaintiff, the same will remain unpaid.

Wherefore this plaintiff prays judgment that said mortgage be adjudged and decreed to be fraudulent and void as against this plaintiff, & such other judgment creditors of Benajah Morse, surviving partner of the late firm of E. & B. Morse, as should elect to come in and share the expenses of this action; that a receiver of all the property & effects belonging to the late firm of E. & B. Morse be appointed, with authority to take such property wherever found, and hold the same subject to the order of the court; and that the defendants, their agents, servants, & employees, in the mean time, be restrained and enjoined from
48 disposing of any of said property, or paying out any of the proceeds thereof, or in any wise interfering therewith; and that said receiver pay out of the proceeds of said property the judgment aforesaid, and the costs and expenses of this action; & that if the said proceeds are insufficient to pay the said judgment of plaintiff, together with interest and costs, that plaintiff have judgment and execution against the said E. M. Dunphy for the residue thereof remaining unsatisfied; and for such other and further relief as to the hon. court may seem just & proper.

WOOLFOLK, PEMBERTON & TOOLE,
Att'ys for Pl'ff.

T. H. Kleinschmidt, the above plaintiff, being first duly sworn, deposes and says, that he has heard the foregoing complaint read, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information
49 & belief, and as to those matters he believes it to be true.

T. H. KLEINSCHMIDT.

Subscribed & sworn to before me this 25th day of May, 1868.

[L. S.] JAMES C. OWINGS, *Notary Public.*

Exhibit "D."

This agreement, made and entered into this 3d day of January, A. D. 1868, by and between Benajah Morse, surviving partner of the late firm of Morse & Morse, of the county of Gallatin, and Territory of Montana, of the first part, and E. M. Dunphy, of the county of Edgerton, and same Territory, of the second part, witnesseth that the said party of the first part, in order to pay off a certain promissory note for the sum of thirty thousand (30,000) dollars, dated Helena, October 31st, 1867, and payable one year after date to E. M. Dunphy, or bearer, and
50 executed by Elkana Morse, late deceased, and by Benajah Morse, the now surviving partner of the late firm of Morse & Morse, composed of said Elkana Morse and said Benajah Morse, and to secure the payment to which the same parties to the note executed a mortgage of even date therewith, upon certain property in said mortgage described, does hereby freely and voluntarily surrender to the said E. M. Dunphy the entire possession and control of all the property in said mortgage described, the said E. M. Dunphy having heretofore, in pursuance of a stipulation in said mortgage, taken possession of a portion of said property; and I hereby authorize the said E. M. Dunphy to dispose of said property, or any part thereof, for the purpose of satisfying said note and mortgage, having a due regard in such disposition of said property to my interest, and the interest of my creditors therein,
51 & the interest of the creditors of the late firm of Morse & Morse, and to apply the proceeds of all net sales thereof; that is, after paying and deducting all necessary expenses in the keeping, securing, collecting, and disposing of said property to the satisfaction of said mortgage and note until the same shall be fully paid off and satisfied. And the said E. M. Dunphy, party of the second part, covenants and agrees to make such disposition of said property as shall be to the mutual benefit of the parties prior to the time said note and mortgage became absolutely due & payable, and not to make any sacrafice or forced sale of any of said property, unless the same shall be made after said note and mortgage became due and payable, and then to be made for whatever amount may remain due and unpaid thereon, and only
52 in strict pursuance of the stipulations in said mortgage contained. And the said E. M. Dunphy hereby agrees to allow the said party of the first part two per cent. per month upon all amounts credited upon said note & mortgage from the respective dates of such credits until the 31st day of October, A. D. 1868, when said note & mortgage become due and payable. In order the more fully to designate said note and mortgage, it is agreed and understood that it is the only note and the only mortgage ever executed by the parties thereto to the said E. M. Dunphy.

Witness our hands and seals the day and year first above written.

BENAJAH MORSE. [SEAL.]

E. M. DUNPHY. [SEAL.]

Witness: GEO. MAY.

MONTANA TERRITORY, *Gallatin County, ss :*

I, R. P. Vivion, recorder within & for said county, do hereby
53 certify that the foregoing article of agreement was filed in my office for record on the 4th day of January, A. D. 1868, and was duly recorded in Book "F," page 202 & 203.

Witness my hand and seal of office this 24th day of March, A. D. 1868.

R. P. VIVION, *Recorder*,
T. R. EDWARDS, *D. R.*

James E. Owings, being first duly sworn, deposes and says that he delivered a copy of the within amended complaint to W'm Chumasero, att'y for defendants, in Helena City, M. T., on the 25th day of May, A. D. 1868.

JAMES E. OWINGS.

Subscribed & sworn to before me this 25th day of May, 1868.

M. F. TRUETT,
Probate Judge.

And thereafter, to wit, on the 22d day of June, 1868, defendant Dunphy filed his seperate answer, of which, in words & figures, the
54 following is a copy, to wit:

THEODORE KLEINSCHMIDT
vs.
BENAJAH MORSE, SURVIVING, &C., & E. M. Dunphy.

In the first judicial dist. court, Madison County, M. T.

The seperate answer of E. M. Dunphy, one of the defendants in this cause, to the complaint of said plaintiff.

This defendant, for answer to said complaint, says that he has been informed, and believes, that the said plaintiff did, at the time in said bill of complaint mentioned, enter a judgment in his favor, against said defendant, Benajah Morse, survivor, &c, for the said sum of $16,957\frac{50}{100}$, but he denies that said judgment was legally rendered against said Morse.

He says that he has been informed, and believes, that at the
55 time of the sitting of the court in which said judgment was so rendered, the said Benajah Morse, by W'm Chumasero and Geo. May, his attorneys, entered a special appearance only for the sole and only purpose of moving the court to quash the summons and the return thereon of the sheriff, which had been issued and made in said cause; which motion was sustained by the court, and the said summons and the sheriff's return thereon was, on the 9th day of March, A. D. 1868, quashed, as appears by an order of said court entered on the records thereof, a certified copy of which said order is hereto annexed and marked Exhibit "A," and made a part hereof.

And this defendant, further answering, says that no other service of any process in said cause was ever made on said Morse, nor, as he has been advised and believes, was any other or further appearance
56 ever entered by said Morse in said cause, nor by any attorney for him or on his behalf; and he avers and charges that the said judg-

ment was improperly and illegally entered against the said Morse by said plaintiff. Defendant admits that the execution mentioned in said bill was issued on said judgment so illegally entered as aforesaid.

He says he does not know whether a transcript was filed, as stated in said complaint, nor whether said execution was returned unsatisfied or not. Defendant admits that on the 31st day of October, A. D. 1867, a mortgage was executed and delivered to him by said E. & B. Morse, on certain property therein named, a certified copy of which mortgage is hereto annexed and marked Exhibit "B," and is made a part hereof, and to which reference is had.

57 This defendant further says that the said copy of mortgage hereto attached is the only one ever executed by said Morse to him, this defendant.

He says that he has been informed, and believes, that the recorder of said Gallatin County did make a mistake in the recording of said mortgage, stating the sum intending to be secured thereby to be only three thousand dollars instead of thirty thousand dollars, which last-named sum is the correct sum. And he avers that said record was, on or about the 4th day of January, 1868, and long prior to the rendition of said judgment of said plaintiff, corrected by said recorder. He further states that he does not know in what sum, if anything, said Morse is indebted to the persons named in said complaint.

This defendant, further answering, says that it is not true that said mortgage was made with the intent to hinder, delay, and defraud any

58 of the creditors of the said E. & B. Morse, but only for the purpose of securing to this defendant money actually due, and to become due, to this defendant, as is particularly mentioned and set forth in the said mortgage.

This defendant further says that at the date of the execution of the said mortgage there was actually due and owing to him from the E. & B. Morse, for goods, wares, and merchandise which had been actually sold and delivered to them by defendant, the sum of twelve thousand five hundred dollars; and that this defendant applied to said E. & B. Morse to secure him, which they at first declined doing, and the next day after defendant had so applied they offered, provided said defendant would advance them ten thousand dollars in money in addition to said indebtedness; they would pay him interest thereon at the rate of five per cent. per month; and that they would give him the said security,

59 which this defendant consented to do, and did advance to them the said sum of ten thousand dollars in United States treasury notes. Whereupon the said E. & B. Morse did execute and deliver to this defendant thier note for thirty thousand dollars, which sum included the interest thereon and on said bills of goods so sold to them up to the time of the maturity of the said note; and also, at the same time, executed the aforesaid mortgage to secure the payment of the same, and which is the actual indebetness due from said E. & B. Morse to this defendant. And he absolutely denies that any part thereof was or is fictitious, but avers that it was and is an actual, bona-fide, existing indebtedness, due and owing from said E. & B. Morse to this defendant. And this defendant denies that said indebtedness was to be paid

60 to him by said E. & B. Morse in flour, as stated in said complaint. And this defendant says that the allegation in said complaint that he, this defendant, has ever at any time or to any person or persons whomsoever confessed and acknowledged that the said mortgage was in reality executed to hinder, delay, and defraud the creditors of said E. & B.

Exhibit "A."

Territory of Montana, county of Lewis & Clark, district court, 3d judicial dist.

T. H. KLEINSCHMIDT
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse.

On the 9th day of March, A. D. 1868, in the district court of the 3rd judicial district of Montana Territory, in & for Lewis & Clark County, being one of the regular days of the March term of said court—present, Hon. L. E. Munson, judge—the following order was made in the above-entitled cause, to wit:

68 "This cause having been heard upon the defendant's motion to quash alias summons, it is ordered that the said motion be allowed, and that the said summons & return of the sheriff thereon be quashed."

I hereby certify the foregoing to be a true copy of an order as appears of record in said court.

Witness my hand and the seal of said court this 8th day of May, A. D. 1868.

[L. S.] CHAS. W. FOWLER, *Clerk.*

Exhibit "B."

This indenture, made and entered this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-seven, between B. Morse and E. Morse, of Gallatin County, Montana Territory, of the first part, and Elijah M. Dunphy, of Edgerton County, in the Territory aforesaid, of the second part, witnesseth that the said

69 parties of the first part, in consideration of the sum of thirty thousand dollars to him in hand paid by the said party of the second part, the receipt of which [of which] is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said party of the second part, and to his heirs and assigns, forever, all of the following described real and personal property, to wit: A certain ranche situated in Gallatin Valley, in Gallatin County, in said Territory, known as Morse's ranche, and containing six hundred and forty (640) acres, together with the undivided two-thirds part of all the crops harvested and gathered therefrom, and the stock belonging on said ranche; also the store and lot situated in said Gallatin Valley, and known as Morse's store, with all goods, wares, and merchandise now therein, and book accounts

70 and evidences of indebtedness due to said parties of the first part from any and all persons whomsoever; also two hundred and twenty-five head of cattle now owned by and in the possession of said first parties in said Gallatin County; also ten head of horses and colts and two jacks; also twelve mules, with their harness; also four saddles; also five wagons; also the undivided half of one threshing-machine; also one hundred tons of hay; also 300 bushels of wheat, now at the Madison Mills, in said Gallatin County; also one reaper and mower—all of said property now being in possession of said first parties, in the said county of Gallatin; also six houses and lots in Summit City, in the

county of Madison, in said Territory of Montana, together with all and singular the appurtenances, &c., to said property, or any of the same, belonging and appertaining: To have and to hold the same, with the appurtenances, unto the said party of the second part, his heirs
71 and assigns, forever. And the said first parties do hereby covenant, to and with said second party, that they have title to all the above-mentioned property, and have good right to sell and convey the same; that is clear from incumbrances; and that they will warrant and defend the title thereto to said second party, his heirs and assigns, forever: Provided always, and these presents are upon this express condition, that if said parties of the first , their heirs and assigns, shall well and truly pay, or cause to be paid, to said party of the second part, or his assigns or personal representatives, the just and full sum of thirty thousand dollars, in twelve months from the date hereof, according to the condition of a certain promissory note bearing even date herewith, given by said first parties to said second party, then this instrument to be void, otherwise to remain in full force and effect.
72 But in case of default of the payment of said sum of money, with the interest thereon, or any part thereof, according to the tenor and effect of said note, when the same shall by its terms become due and payable, the said second party, after having advertised such sale for twenty days in a newspaper published in Edgerton County, or by posting notices in four public places in Gallatin County, may sell the same property, or any part thereof, at public auction to the highest bidder for cash, at the place mentioned in said advertisement, and, making said sale as the attorney of said first parties, for that purpose hereby constituted, irrevocable, or in the name of the second party, shall execute deeds of the property so sold to the purchasers thereof, and from the proceeds of such sale shall pay (1) the expenses of advertising, selling, and conveying as aforesaid, and including attorneys fees; (2,)
73 the amount then due on said note, principal and interest; and (3) render the overplus, if any, to said first parties at the office of said second party in Helena. And it is further agreed between the parties that until default be made in the payment aforesaid, it shall and may be lawful for said first parties, and they are hereby authorized, to retain, keep possession, and carefully use, all of the said property above herein described. And it is further agreed that if said parties of the first part shall sell or dispose of said property, or any part thereof, without the consent of said second party, or if at any time prior to the maturity of said note said second party shall be of opinion that the longer retention of said property by said first parties would endanger his security, it shall and will be lawful for said second party, at any time
74 after this date, to take possession of the same, or any part thereof, and hold the same for security for the payment of said note until its maturity as aforesaid.

In witness whereof the said first parties have hereunto set their hands and seals the day and year first above written.

BENAJAH MORSE. [SEAL.]
ELKANA MORSE. [SEAL.]

Witness:
WM. CHUMASERO.

TERRITORY OF MONTANA, *Gallatin County, ss:*

On this 5th day of November, 1867, before me, the undersigned, personally came E. Morse and B. Morse, to me personally known to be the persons described in and who executed the foregoing instrument, and

acknowledged that they had executed the same for the uses and purposes therein mentioned.

75 Given under my hand and official seal the day and year aforesaid.

R. P. VIVIVIAN.
Clerk and Recorder of Gallatin County, M. T.

The following endorsement appears on the margin of the above record:

Examined and corrected by the original, now on file in this office, this January 4th, A. D. 1868.

R. P. VIVION, *Recorder*,
By WM. P. PARSONS, *D. R'er.*

TERRITORY OF MONTANA, *County of Gallatin, ss:*

I, R. P. Vivion, recorder within and for said county and Territory, do hereby certify that the foregoing mortgage from B. & E. Morse to E. M. Dunphy is a true, correct, and complete copy of the same as it now appears of record in my office, in deed & mortgage book F, pages 152, 153, & 154.

In testimony whereof I have hereto set my hand and seal of office this 8th day of May, A. D. 1868.

[L. S.]

R. P. VIVION, *Recorder*,
T. R. EDWARDS, *D. R.*

76 On the 22nd day of June, A. D. 1868, the answer of Benajah Morse was filed, of which, in words and figures, the following is a copy, to wit:

THEODORE H. KLEINSCHMIDT, PL'FF,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse and Elijah M. Dunphy, def'ts.

In equity, in the territorial district court, 1st judicial district, Gallatin County, Montana Territory.

And now comes Benajah Morse, surviving partner, &c., and for seperate and conditional answer to plaintiff's complaint herein made for the purpose of moving for a modification of the injunction herein, and contesting the right of plaintiff to the appointment of a receiver herein, as to the property claimed by E. M. Dunphy, and reserving to

77 himself all right to object to the sufficiency of said complaint, says, that he denies that the said plaintiff was entitled to recover the judgment against him, a copy of which is appended to plaintiff's complaint; but avers the fact to be, that, at the time of the court at which the judgment was rendered, he, defendant, appeared by his attorneys, Wm. Chumasero and Geo. May, and filed his motion to quash the summons in said case, which motion was sustained by the court in said case, and that no further service of summons than the one quashed was ever made upon him, and that the judgment purporting to have been rendered in said case was rendered by default without due service of legal process, and that defendant did not, by himself or counsel, waive the service of process, and therefore that the said judgment is illegal and void.

78 Defendant further answering says, that it is true that he, together with his then copartner, Elkana Morse, at the time stated in plaintiff's complaint, executed and delivered to E. M. Dunphy a mortgage; but says that the copy appended to plaintiff's complaint is not a true copy of the said mortgage, and avers that the said mortgage was given to secure the payment of a promissory note, of even date with said mortgage, for the sum of thirty thousand dollars; and that the sum of three thousand dollars, which is contained in said copy, was thirty thousand dollars in the original; and that, as he is informed and believes, that the recorder of said Gallatin County, in recording said mortgage, made a mistake in recording the same "three thousand dollars," when, in truth and in fact, it was "thirty thousand dollars;" and
79 that afterwards, to wit, on or about the 4th day of January, A. D. 1868, the said recorder corrected said mistake in the recording of said mortgage. And the said defendant says that the said mortgage and note was made in good faith to secure the said E. M. Dunphy for goods, wares, and merchandise to the amount of twelve thousand and five hundred dollars purchased by him and his said copartner, of E. M. Dunphy, and for the sum of ten thousand dollars money borrowed of said E. M. Dunphy, and for interest on the said purchase of goods and said money so borrowed; and further states that the goods, wares, and merchandise so purchased was included in the said mortgage to the said Dunphy.

And the said defendant denies that there was any fraud in the said transaction between him, his copartner, and said Dunphy, but
80 avers that it was bona fide and in good faith, and made for the purpose of securing the said Dunphy as aforesaid.

Def't says that the amount of goods, wares, and merchandise in said Morses' store on or about the 3rd day of January, A. D. 1868, was, as per inventory, of the value of four thousand and six hundred and forty-nine dollars and one cent; and that he delivered the same, together with the store-house, to said E. M. Dunphy, who received the same in part satisfaction of said note and mortgage, at the sum of four thousand six hundred and forty-nine dollars & one cent.

Def't further says that there is now in the said store, formerly known as Morse's store, not to exceed the value of one thousand dollars of the goods so delivered by him, as aforesaid, to E. M. Dunphy, and that the balance of the goods, wares, & merchandise in said store have
81 been since purchased by the said E. M. Dunphy, for the purpose of replenishing his stock and carrying on the business of merchandising, and that the defendant has no interest in the said goods and store, but that E. M. Dunphy is the lawful owner of the same.

Def't denies that he ever admitted to any person that the indebtedness to the said Dunphy was fictitious, and that there was only an actual indebtedness of six or seven thousand dollars due, or to become due, but that the actual amount to become due was thirty thousand dollars, as expressed in said note and mortgage, and denies that the same was to be paid as charged in plaintiff's complaint.

Def't denies that he ever confessed to any person or persons that said mortgage was executed to hinder, delay, and defraud the creditors of E. & B. Morse, but avers that it was bona fide, and for the con-
82 sideration expressed in said note and mortgage.

Def't, further answering, denies all the allegations of fraud alleged in said complaint.

WM. CHUMASERO &
GEO. MAY,
Atty's for Respondant.

TERRITORY OF MONTANA, *County of Gallatin, ss:*

Benajah Morse, being first duly sworn upon his oath, says that he is one of the defendants in the above-entitled case; that he has heard the foregoing answer read, and knows the contents thereof; and that the same is true of his own knowledge, except as to matters and facts therein stated on information and belief; and as to those matters, he believes it to be true.

BENAJAH MORSE.

Subscribed and sworn to before me this 2nd day of May, A. D. 1868.

A. KEATON,
Justice of the Peace, Gallatin County, M. T.

83 And on the 22nd day of June, 1868, plaintiff filed replication to answer of Benajah Morse, of which, in words & figures, the following is a copy, to wit:

THEODORE H. KLEINSCHMIDT, PL'FF,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, and E. M. Dunphy, def'ts.

In the territorial district court, 1st judicial district, Gallatin County, Montana Territory.

The plaintiff for replication to the seperate answer of the defendant, Benajah Morse, denies that the judgment purporting to have been rendered in said cause was rendered by default, without due service of legal process, or that defendant did not, by himself or counsel, waived the process.

84 2. Denies that said judgment is illegal and void.

3. As to the allegation that the mortgage from defendant & E. Morse to E. M. Dunphy was executed for thirty thousand dollars, and that the record thereof, by mistake, was made for three thousand dollars, the plaintiff has no knowledge or information sufficient to form a belief, and asks the defendant be held to strict proof thereof.

Denies that said mortgage and note were made in good faith to secure the said E. M. Dunphy for goods, wares, and merchandise to the amount of twelve thousand five hundred dollars, purchased by him and his said copartner of said Dunphy, and also for the sum of ten thousand dollars money borrowed of said E. M. Dunphy, and for interest on said purchase of goods, as is alleged in the answer of defendant.

85 Denies that the transaction aforesaid was bona fide and in good faith, and made for the purpose of securing the said Dunphy, as alleged in defendant's answer.

Denies that on or about the 3rd day of January, 1868, the defendant delivered the store-house, and goods therein, to E. M. Dunphy, and that said Dunphy received the same in part satisfaction of said note and mortgage, at the sum of four thousand six hundred and forty-nine dollars and one cent.

Denies that there is not now in the store known as Morse's store not to exceed the value of one thousand dollars of the goods delivered by him to E. M. Dunphy.

Denies that the balance of said goods, in said store, have since been purchased by E. M. Dunphy, and that defendant has no interest therein, but that said Dunphy is the lawful owner thereof.

86 Denies that the actual indebtedness due or to become due from said E. & B. Morse to E. M. Dunphy, was thirty thousand dollars, as alleged in defendant's answer.

Denies each and every material allegation of defendant's answer.

THOMAS THOROUGHMAN,
WOOLFOLK & TOOLE,
Att'ys for Pl'ff.

T. H. Kleinschmidt, being first duly sworn, deposes and says that he has heard the foregoing replication read, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

T. H. KLEINSCHMIDT.

Subscribed & sworn to before me this 22nd day of June, 1868.
JAMES GOSTLING, *Clerk.*

87 And afterwards, to wit, on the 22d day of June, 1868, plaintiff filed replication to defendants' answer, of which in words and figures the following is a copy, to wit:

THEODORE H. KLEINSCHMIDT, Pl'ff,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, & E. M. Dunphy, def'ts.

In the territorial district court, 1st judicial district, Gallatin County, Montana Territory.

The plaintiff, for replication to the answer of the defendants, denies that after quashing the summons in the cause of T. H. Kleinschmidt against B. Morse, surviving partner of E. & B. Morse, on the 9th day of March, 1868, there was no other or further appearance ever entered by the said Morse or his attorneys, for him or on his behalf.

88 Denies that the said judgment was improperly and illegally entered against the said Morse by the said plaintiff.

Denies that there was any mistake made by the recorder of Gallatin County in recording the mortgage of the defendant Dunphy for three thousand dollars.

Denies that he has any knowledge or information sufficient to form a belief as to whether any mistake in the record of said mortgage was corrected by the recorder of Gallatin County on or about the 4th day of January, 1868.

Denies that there was actually due and owing defendant Dunphy, from E. & B. Morse, at the time of the execution of the said mortgage, the sum of twelve thousand five hundred dollars, or that defendant Dunphy applied to the said E. & B. Morse to secure him, which

89 they at first declined to do.

Denies that they finally agreed to pay said Dunphy five per cent. per month interest on ten thousand dollars in money, and also secured the aforesaid indebtedness.

Denies that the said Dunphy did advance to the said E. & B. Morse the sum of ten thousand dollars in United States treasury notes.

Denies that E. & B. Morse did execute and deliver to E. M. Dunphy their note for thirty thousand dollars.

Denies that said note and mortgage were executed for an actual, bona-fide, existing indebtedness to said Dunphy for said amount.

Denies that the interest of Benajah Morse was ever legally advertised for sale and sold by the sheriff of Gallatin County, and that the said Dunphy became a legal purchaser at said sale of the prop-
90 erty so advertised.

Denies that at the time of the filing of the complaint of the plaintiff in this cause, there was not to exceed the amount of one thousand dollars' worth of goods, wares, and merchandise in the store of defendant in Gallatin County, which was at any time owned by the said E. &. B. Morse, or either of them.

Denies that the said Dunphy now has in the said store the sum of sixteen thousand dollars' worth of goods, all of which, with the exception of one thousand dollars, has been purchased with the private means of said Dunphy.

Denies that the said Morse had no interest in said stock of goods.

Denies that defendant Dunphy has faithfully and fairly acted under the agreement between himself & E. & B. Morse.

Denies that the said Dunphy has not more than sufficient
91 property in his possession to make himself good or to pay any indebtedness due him.

Denies that a large amount of stock included in the mortgage strayed away or were taken away by persons to the defendant unknown; and denies that said defendant had never been able to get the possession thereof had he desired to do so.

THOMAS THOROUGHMAN and
WOOLFOLK & TOOLE,
Att'ys for Pl'ff.

T. H. Kleinschmidt, being first duly sworn, deposes and says that he has heard the foregoing replication read, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information & belief, and as to those matters he believes it to be true.

T. H. KLEINSCHMIDT.

Subscribed & sworn to before me this 22nd day of June, 1868.
JAMES GOSTLING, *Clerk.*

92 Afterwards, on the 23d day of June, 1868, petition of C. E. Duer was ordered allowed to be made a party plaintiff in this cause; of which, in words and figures, the following is a copy, to wit:

T. H. KLEINSCHMIDT, Pl'ff,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF E. & B. Morse, and E. M. Dunphy, def'ts.

In the territorial district court, 1st judicial district, Gallatin County, Montana Territory, in equity.

And now comes Charles E. Duer, by his attorneys Woolfolk & Toole, and prays this hon. court that he may be joined as a party plaintiff in this action, and permitted to share in the benefits thereof, and share the expenses incident to the prosecution of said action.

93 Your petitioner respectfully represents that, on the 12th day of March, A. D. 1868, this petitioner recovered a judgment in an action in the district court of the 3rd judicial district, Lewis & Clark County, Montana Territory, against the defendant Benajah Morse, as surviving partner of the late firm of E. & B. Morse, for the sum of fifteen thousand four hundred and ten ^{05} dollars, as appears by the judgment-roll and proceedings on file in the office of the clerk of the said court, a certified copy of said judgment accompanying the deposition of Charles W. Fowler, clerk of said court, taken in this cause, and now on file in the above cause in this court, and to which, for greater certainty, reference is hereto made.

94 Your petitioner would further represent that afterwards, to wit, on the 19th day of March, 1868, an execution was duly issued out of and under the seal of the aforesaid court upon the said judgment, and against the property of Benajah Morse, surviving partner as aforesaid, and said execution was directed to the sheriff of Gallatin County, (the place of residence of the said defendant;) and, by the terms of said execution, the said sheriff was commanded that of the personal property of the said Benajah Morse, surviving partner as aforesaid, he should make, or cause to be made, the said judgment, interest, and costs; and if said personal property found in his county is insufficient to satisfy the same, that he should make, or cause to be made, the aforesaid amount out of any real property belonging to the said defendant, and make due and lawful return of said execution. A certified copy of said execution & sheriff's return thereon accompa-

95 nies the deposition of Charles W. Fowler, clerk as aforesaid, taken in this cause, and now on file in this court, and to which, for greater certainty, reference is hereto made.

Your petitioner further represents that, on the 20th day of April, 1868, the sheriff of Gallatin County returned said execution to the district clerk of Lewis & Clark County aforesaid, wholly unsatisfied, as appears by the copy of the said execution and sheriff's return thereon above referred to, and to which reference is hereby made.

Your petitioner further represents that, on the 9th day of May, A. D. 1868, an alias execution issued from the court aforesaid, under the seal thereof, upon the aforesaid judgment, and against the property of Benejah Morse, surviving partner as aforesaid, and was directed to

96 the sheriff of Lewis & Clark County; and, by the terms of said execution, the said sheriff was commanded that of the personal of the said Benajah Morse he should make, or cause to be made, the said judgment, interest, and costs; and if said personal property be insufficient, that he should make, or cause to be made, the aforesaid amount out of any real property belonging to said defendant, and make due and lawful return of said execution. A certified copy of said execution and sheriff's return thereon accompanies the said deposition of Charles W. Fowler now on file in this court, and to which reference is hereby made.

Your petitioner further represents that, on the 9th day of June, 1868, the said sheriff of Lewis & Clark County returned said execution unsatisfied, except as to the sum of two hundred and fifty dollars credited thereon, besides $355 15 applied to the payment of costs,

97 all of which will more fully appear by reference to the certified copy of the said alias execution and return thereon on file as aforesaid.

Your petitioner further represents that no other execution has been issued on said judgment aforesaid, and that the same is wholly unsatis-

fied, except the said sum of $250 98 received as aforesaid; that your petitioner was a judgment creditor of B. Morse at the time said creditor's bill was filed by the plaintiff in this cause, as will appear by the said certified copy of record above referred to, and that the execution on said judgment aforesaid had been returned unsatisfied at that time.

Wherefore your petitioner prays that he may come in as a party plaintiff in this cause, and share in the expenses and benefits of this action.

WOOLFOLK & TOOLE,
Att'ys for Petitioner.

98 Alex. M. Woolfolk, being first duly sworn, states that he is one of the attorneys for Charles E. Duer; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true; that affiant makes this affidavit because the said Duer is now absent from this county, and is in Helena City, M. T., and because the facts above stated are well known to the affiant.

ALEX. M. WOOLFOLK.

Subscribed & sworn to before me this 23d day of June, 1868.
JAMES GOSTLING, *Clerk.*

Copy served on def'ts' att'y this 23 June, 1868.
JAMES GOSTLING, *Clerk.*

99 Afterwards, to wit, on the 24th day of June, 1868, defendant filed answer to supplemental complaint, of which in words and figures the following is a copy, to wit:

T. H. KLEINSCHMIDT
vs.
B. MORSE, SURVIVING PARTNER OF E. & B. Morse, & E. M. Dunphy.

The answer of E. N. Dunphy to the supplemental complaint filed herein by Charles E. Duer.

This defendant, for answer, says that, on the execution alleged to have been issued to Gallatin County, the sheriff of said county did levy on certain property sufficient to satisfy, or nearly satisfy, the same, and that the said execution was, by direction of the said Duer or his agents, returned unsatisfied, as this defendant has been informed & believes, and charges the fact to be; all of which acts were fraudulent and collusive.

100 This defendant, for further answer to said supplemental complaint, says that the said Charles E. Duer did, subsequent to the issuing of said execution to Gallatin, procured an execution on the judgment mentioned in said bill, to be issued to the sheriff of said Lewis & Clark County, which said execution was levied upon a sufficient amount of personal property to satisfy the same, and that the said property has never been sold under and by virtue of the said execution.

This defendant further says that the said Charles E. Duer, having so as aforesaid caused an execution to be issued, did cause the same to

be levied upon the said flour in said on the said copy of sheriff's return on the execution mentioned as attached to the deposition C. W. Fowler, and that afterwards this defendant did file his bill against said Charles E. Duer and W. K. Roberts, sheriff the county of Lewis
101 & Clark, on or about the 30th day of May, 1868, & caused summons to be issued thereon, in which this defendant set up title to the said property so levied on and claimed, and does claim the title thereto as against the claims of said Duer, who had caused the same to be levied on as the property of said Morse, and asking the 3d judicial district court in and for said Lewis & Clark, Montana Territory, to adjudicate upon the title of said property; and that it appearing that the same belonged to this defendant, that he have judgment to that effect, and a return of the said property to him, and that in the mean time the said Duer and the said sheriff be enjoined and restrained from making any sale of the said property.

And defendant further says that on filing said complaint an
102 order to show cause why an injunction should not be issued in said cause was made by the Hon. L. E. Munson, judge of the said 3 judicial district court, returnable before the said district court on the 11th day of June, A. D. 1868; and afterwards, to wit, on or about the said 11th day of June, an order was entered that the said Duer and Roberts be restrained in pursuance of the prayer in said complaint contained, which said order was made and entered by the consent of said plaintiff in said cause, and of the said defendant therein, C. Duer, by his attorney, A. M. Woolfolk.

And this defendant says that the said action is now pending in said
3 judicial district court; and he further says that the whole merits of the controversy between said Duer and this defendant, including
103 the controversy as to the validity of the mortgage mentioned in plaintiff's amended complaint involved in this action, are involved in the said suit now pending in said Lewis & Clark County, and that exclusive jurisdiction thereof was acquired by the said 3 judicial district court as between said Duer and this defendant, Dunphy, before any jurisdiction was acquired by this court to determine the same, as will more fully appear by reference to the record and proceedings now remaining on file in the office of the clerk of the said 3d judicial district court, and to which reference is hereby made.

Wherefore he asks for judgment against said Duer, and for his costs.

CHUMASERO, MAY & SANDERS,
Atty's for Dunphy.

TERRITORY OF MONTANA, *Gallatin County:*

104 E. M. Dunphy, being duly sworn, says that he has heard the foregoing answer read, and that the same is true of his own knowledge except as to the matters stated on information and belief; and as for those matters he believes it true.

E. M. DUNPHY.

Subscribed and sworn to this 24th day of June, 1868.

JAMES GOSTLING, *Clerk.*

And afterwards, to wit, on the 24th day of June, 1868, plaintiff filed replication to supplemental answer, of which in words and figures the following is a copy, to wit:

In the district court, 1st judicial district, Gallatin County, Montana Terr.

THEODORE H. KLEINSCHMIDT & CHARLES E. Duer, pl'ffs,
vs.
B. MORSE, SURVIVING PARTNER OF E. & B. Morse, and E. M. Dumphy, def'ts.

105 Now comes Charles E. Duer, by his att'ys, Woolfolk & Toole, and for replication to the answer of E. M. Dunphy, filed in this cause to the petition of this plaintiff to be added as a party, plaintiff herein denies that the sheriff of Gallatin County did levy on certain property sufficient to satisfy or nearly satisfy the same, or did levy upon any property whatever; and as evidence thereof refers to the certified transcript of said execution and return thereon on file in this cause, together with the deposition of Charles W. Fowler.

Denies that said executions were returned unsatisfied by direction of plaintiff or his agents until every means had been exhausted without avail to obtain a levy of said execution upon property embraced in said mortgage to E. M. Dunphy.

Denies that plaintiff has been guilty of any fraud or collusion.

106 Denies that a second execution upon said judgment was ever levied upon sufficient property to satisfy the same.

Admits that said alias execution issued to the sheriff of Lewis & Clark County was levied upon certain flour as the property of B. Morse, as will appear by the certified transcript of said execution and return thereon, now on file in this cause with the deposition of W. Fowler, and to which reference has been already made.

Admits that an action of injunction was brought against this petitioner jointly with W. K. Roberts, sheriff, by the said E. M. Dunphy, who claimed to be the owner of said flour, and that said action was brought to restrain the sale of said flour.

Admits that Hon. L. E. Munson, judge, did restrain the sale of said flour, as prayed for in complaint; and that afterwards all the flour levied

107 upon on said execution was turned over to J. J. Hull, receiver in this cause, by order of the said L. E. Munson, and Hon. H. L. Hosmer, judge of this court; that after said flour had been turned over as aforesaid to the receiver, there having been no other property levied upon, the said sheriff of Lewis & Clark County returned the said execution unsatisfied. All of which will fully appear by the certified transcript of the said execution and sheriff's return thereon above referred to.

Your petitioner further states that the action of injunction referred to in defendant's answer was brought, as above stated, to restrain this petitioner and the sheriff aforesaid from selling the said flour, under execution; that as soon as the said flour was turned over to the receiver by the sheriff, as directed by the court, and the said execution was

108 returned, the object of the said injunction suit was accomplished, and the same presents no bar to this petitioner becoming a party to the complaint or creditors' bill filed in this cause.

WOOLFOLK & TOOLE,
Att'ys for Petitioner.

Alex. M. Woolfolk, being first duly sworn, states that Charles E. Duer resides out of this county and in the town of Helena, Montana Ter.; that affiant is one of the attorneys for said Duer; that he has read the foregoing replication and knows the contents thereof; that the

same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true; that his reason for making this affidavit is that the facts stated in this replication are well known to him.

A. M. WOOLFOLK.

109 Subscribed and sworn to before me this 25th day of June, 1868.

JAMES GOSTLING, *Clerk.*

Afterwards, on the 27th day of June, A. D. 1868, before the introduction of any evidence on behalf of the plaintiffs, the defendants' attorneys, in open court, withdrew the appearance of Benajah Morse to the action, making no further defence thereto on behalf of said Morse, and entered such withdrawal upon the records as follows:

T. H. KLEINSCHMIDT ET AL.
vs.
B. MORSE & E. M. DUNPHY.

JUNE 27TH, 1868.

This day this cause came on to be heard, and the parties appearing by their respective att'ys, and a jury being called, come, to wit, S. A. Bostwick, E. A. Dupues, W'm McAdow, Mandred Hart, H'y Montfortin, John Nixon, John Ault, W. H. Hefner, L. Stockman,
110 J. S. Mendenhall, W. A. Babook, & J. Roberts, good and lawful men, who were duly empanneled, chosen, tried, and sworn, and proceeded to hear the pleadings and the issues joined read to them by the counsel, both for plaintiffs and defendants, when it was agreed and ordered of record that the attorneys for the defendants withdraw all further apperance of B. Morse, one of the above-named defendants.

The cause thereupon was tried before the jury, who, failing to agree, were discharged.

Afterwards, to wit, on the 6th day of October, 1868, plaintiffs and defendant filed thier stipulation in writing for change of venue to 3rd judicial district, Lewis & Clark County, Montana Territory, of which in words & figures the following is a copy, to wit:

111 T. H. KLIENSCHMIDT AND CHARLES E. Duer, pl'ffs,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF E. & B. Morse, and E. M. Dunphy, def'ts.

In the territorial district court, 1st judicial district Lewis & Clark County, Montana Territory.

It is hereby stipulated and agreed between the undersigned attorneys for plaintiffs and defendants that the venue of the above cause be changed from Gallatin County to Lewis & Clark County, Montana Territory.

Witness our hands the 3rd day of October, A. D. 1868.

W'M CHUMASERO,
Att'y for Dunphy.
WOOLFOLK & TOOLE,
Att'ys for Pl'ffs.

That afterwards, to wit, on the 15th of March, 1869, the said
112 cause came up for trial in the 3d judicial district court, Lewis &

Clark County, Hon. Hiram Knowles, associate justice, presiding.

The following-named persons were then empanneled and sworn in said cause as jurors, to wit:

Sol. Rosenfield, A. W. Kingsbury, H. Nafus, J. Wonderly, J. H. Curtis, J. J. Dawnhour, Patrick Woods, Z. Hoyt, G. W. Tubbs, H. J. Harris, Charles Rice, George Secord.

William Herron was then produced and sworn on part of plaintiffs, and testified as follows:

I had conversation with defendant, Dunphy, on the evening of the last day of October, 1867; was introduced to him by Col. May. I think it was on the last day of October, 1867; but am positive it was
115 after E. & B. Morse had left Helena for Gallatin County. Dunphy told me in the course of the conversation that he had sold the Morses a bill of goods for a thousand sacks of flour, to be delivered to him in Galena by the 1st day of January, A. D. 1668. If not delivered by that time, they were to pay him ten dollars a sack for every sack they failed to deliver by that time. He further said he had taken security. We then talked about my difficulty with the Morses. I told him if Morses would return the property of mine in the hands of the receiver, I would settle for $2,000. I have no interest in this suit. I have given bonds, in another suit, for property claimed by Bently, which I have had sold, in which is involved the issue of the fraud of Morse & Dunphy. I don't think Dunphy said $10,000 [dollars] was all that
114 Morses owed him. I cannot state whether Dunphy stated to me he was secured for 1,000 sacks of flour, or for what Morses owed him. I understood him to say he had taken security for the flour. Have spent considerable time hunting testimony for plaintiff in this case up to this time. I had a difficulty with Elkana Morse, which resulted in his death at my hands.

W. L. Perkins' deposition then read to jury:

Question. State your name, age, & place of residence.

Answer. My name is W. L. Perkins, and am thirty-five years of age; my place of residence is Gallatin City, M. T.

Question. Have you ever had any dealing with the firm of E. &. B. Morse? and, if so, state what they were.

115 Answer. I bought goods from them at different times; commenced dealing with them some time in eighteen hundred and sixty-six, and traded with them until April, 1867, at which time I made a settlement; paid them fifty-seven dollars cash, and the account then run until March, 1868, when I gave my note for the ballance, which was about thirty-seven dollars in gold-dust; the amount I paid first was also in gold-dust.

Question. State if, after the 3rd day of January, 1868, any parties endeavored to collect the ballance due by you to E. & B. Morse; and, if so, state who they were.

Answer. Maj. Morse came to my house in Feb'y, 1868, and asked me if I had any money for him, and I told him that I had not just then, but could pay him in a few days. After this he came again about
116 the last day of March. I had no money, but gave him my note; he drew the note himself, and drew it in favor of E. M. Dunphy; I asked him what was the meaning of his drawing the note in Dunphy's note, & he replied that he was helping Dunphy to settle up the business; the exact language I don't remember; he said but little on this subject; did not seem to wish to talk about it.

Question. At the time Morse met you in Feb'y, did he say anything about Dunphy being interested in the account?

(Question objected to.)

Answer. He did not.

Question. State, as near as you can recollect, the language in which he demanded of you the account.

Answer. He came there; wanted to know if I had any money
117 for him. I told him no, but could have in a few days if I was not disappointed. He remarked that the account had run for a long time & ought to be settled. I told him that I knew so & thought that I could settle it by the last of March.

Question. State whether you have been in Morse's store since January 3rd, 1868, &, if so, about what time, & name the parties who had charge of the store, & were selling goods.

Answer. I was there about the 10th of January, 1868. Maj. Morse, when I first went in, was lying of the counter; his head was on a pile of sheeting, or on some other kind of goods. I did not recognize any other parties that I knew at the time. The house had 8 or ten men in it. Some one inquired for shoes or boots. Maj. Morse went
118 around to wait on him & showed him the shoes & boots.

Cross-examination.

Question. What became of that note, to which you alluded?

Answer. I was in Helena some time in July or August, 1868. Mr. Dunphy came to me and said that he understood that I wanted to pay that note. I told him I had the money, & had had it for a long time, to pay the note. He said, "Come with me." We went to Mr. Hershfield, & then introduced the business on which I came. Mr. Hershfield told me to pay the note. I told him that Mr. Hull, the receiver, had stopped the interest on the note; I had tendered him payment of the note, but he could not find it. Mr. Hershfield said if I did not pay the note & interest he would sue me. I paid note & interest to Mr. Hershfield up to date, & have the note now, with Mr. Hershfield's indorsement on it.

119 Question. Do you know who had charge of the store on or about the 10th of January, 1868?

Answer. I do not know who had charge of the store. I know Morse was there. There was a man there somebody called Sill; he was there reading a paper to the crowd, & that induced me to ask who he was.

Question. Did you see any one sell any goods, or receive any money, while you were there?

Answer. I did not see any money pass hands.

W. L. PERKINS.

R. B. Curtis' deposition read by plaintiff:

Question. What is your name, age, & place of residence?

Answer. My name is R. B. Curtis; am 33 years of age; and
120 reside near the Nelson Crossing, on the West Gallatin.

Question. Did you know the firm of E. &. B. Morse?

Answer. Yes, sir.

Question. Have you ever done any business with the firm?

Answer. Yes, sir.

Question. How long have you done business with this firm?

Answer. From the fall of 1866, to May, 1868.

Question. Have you ever had a settlement with them since January 3rd, 1868?

Answer. Yes, sir.

Question. State when & where, & how the settlement was made.

Answer. The account was looked over in the store about the 20th of January, & there was a balance of about $180 00 due Morse. In
121 a few days afterwards I met Mr. Morse & Mr. Sill about a mile & a half above Morse's store, near Roberts' place. We went into Mr. Roberts', & I paid Mr. B. Morse $100 00 in dust, to apply on the account. After that he & Mr. Sill was at my place some time about the first of Feb'y, & I sold them a cow for fifty-five dollars, & turned it in on account. Mr. Morse told me that he had got the 45 bushels of wheat which I had sold to Roberts, & wanted me to deliver it to the Madison Mills.

Question. Did you deliver this wheat all at one time?

Answer. No, sir; I delivered it in two seperate lots.

Question. About what time did you deliver each of these lots of wheat, & to whom?

Answer. First was 23 bushels, delivered the 3rd of March; this
122 wheat was delivered to Morse, or order, at Madison Mills. Mr. Sill was there, & said he would empty the wheat & return the sacks. The second lot was delivered about the first of May; I sent the wheat down, did not go with it. I think there was about 20½ bushels. This is as far as I had any dealing with them until some time in April, when, on looking over the books, there was found an account of about 28 or 30 dollars against me.

Question. Have you, at any time since the 3rd of January, see any goods moved from Morse's store?

Answer. Mr. Seagrass came to my place with a load of goods; at least, he said he had a load.

(Objected to; excluded by c't.)

Question. Where was this wagon going to?

123 Answer. It went in the direction of the Nelson Crossing as far as I saw it go.

Question. Do you know where Morse's ranche is?

Answer. Yes, sir.

Question. Was this team or this wagon going in the direction of Morse's ranch?

Answer. Yes, sir; from my place they were going the most direct way.

Question. Did you see that wagon return?

Answer. Yes, sir.

Question. When did it return & who was with the wagon?

Answer. It returned the next day about one or two o'clock. Mr. Seagrass was with the wagon.

Question. Did Mr. Seagrass tell you where he had come from that morning?

Answer. No, sir.

124 *Cross-examination.*

Question. Do you know for whom the corn you spoke of was bought?

Answer. They told me they were buying it for Mr. Dunphy.

Question. Do you know for whom the wheat was delivered?

Answer. It was delivered for Mr. Morse, as far as I know.

Question. Do you know whether or not there were any goods in the wagon you spoke of having passed your place?

Answer. No, sir; but there were boxes in the wagon such as goods are carried in—tight boxes; but I don't know what was in them.

Question. Did Mr. Seagrass tell you whose goods they were? and, if so, state.

Answer. Yes, sir, he did; he said that they belonged to Mr.
125 Story. It was a load Mr. Story had brought from Virginia & left in Morse's store.

Question. In your direct examination you state the wagon was going in the direction of Morse's ranch; was it going in the direction of any other ranch?

Answer. It was going in the road that would lead to most any ranch on the East Gallatin.

Question. Do you know where the wagon went to, & where it unloaded?

Answer. No, sir; I do not.

R. B. CURTIS.

J. E. Burch then sworn for plaintiff, and testified as follows:

I know Sill; he acted as clerk for Morses before the death of E. Morse. I saw him there in Feb'y, 1868. The last transaction I
126 had with the Morses was latter [latter] part of February, 1868. I called for Morse at Kreitzer's for the purpose of settling a store bill I owed. Maj. Morse and I went to his store. He said balance I owed was one dollar. Morse at first refused to let me come in the store, but finally, after I gave him my purse, he invited me in to see my money weighed out. There were no goods in the store. I paid him one dollar. He said he hoped I would say nothing about it; he never took me to be an enemy of his.

E. W. McNeal was then sworn on part of plaintiffs; testified as follows:

Had a conversation with defendant, Dunphy, about six weeks ago. Dunphy presented note; asked me for balance due on it. Note
127 was executed several years ago, payable to Rounsdell, with Benajah Morse as security. Dunphy said that Benajah Morse had left this note with him along with other matters; that he, Dunphy, was not out any money for the note, but that he was out a great deal of money dealing with the Morses. This note was executed at Summit City about four years ago. Morse, as my security, paid it for me.

Plaintiff then offered in evidence deposition of W. Curtis:

Question. State your name, age, & place of residence.

Answer. W. Curtis; age, 30 years; reside in the lower end of the island on the West Gallatin, about 1½ miles from Morse's store.

Question. Have you ever bought any goods from E. & B. Morse?
128 Answer. I have bought a few.

Question. Have you ever had a settlement with them for the same?

Answer. I have had a settlement with them for what accounts they had against me.

Question. When did this settlement take place, & how did you settle?

Answer. It took place about the 10th of January. I settled by paying the money. I paid about $27 00.

Question. To whom did you pay this money?

Answer. I paid it to Maj. Morse.

Question. Did this settle the account?
Answer. Yes, sir.

Cross-examination.

Question. Do you take a receipt or receive a bill when you settled?
Answer. No, sir.

Question. Do you know in what capacity Maj. Morse was act-
129 ing at the time you made the settlement with him?
Answer. I don't know.

WALCOTT CURTIS.

Plaintiff then offered in evidence deposition of O. E. Penwell.

Question. What is your name, age, & place of residence?
Answer. O. E. Penwell; age, 30 years; reside on Ross Creek, at Union Mills, in Gallatin County, M. T.
Question. What business do you follow in Gallatin County?
Answer. Milling.
Question. Have you ever ground any wheat for Maj. Morse?
Answer. I ground some wheat that was left there by Morse's order.
Question. Did you ever have any conversation with Maj. Morse about this wheat?

Answer. I did.
130 Question. State the conversation, & when it took place.
Answer. It was some time in Feb'y; he told me that there would be wheat delivered by Thompson & others. I think he said that it was to be ground for Mr. E. M. Dunphy. There was about 40 bushels at one time, 20 at another, & 14 by Reese.
Question. How much grain alltogether has been delivered to be ground into flour for Dunphy?
Answer. Somewhere in the neighborhood of 475 bushels.
Question. How many sacks of flour have been delivered to Mr. Dunphy?
Answer. There was 115 sacks delivered to Chestnut & Small for Mr. E. M. Dunphy.
Question. Did you ever run an account with Maj. Morse?

Answer. I did.
131 Question. Relate when & how that account was settled?
Answer. It was settled, during the month of May last, in flour delivered to E. M. Dunphy in Helena; the amount of fifteen sacks of flour.
Question. Previous to this settlement, did Maj. Morse ever talk to you about settlement?
Answer. He did.
Question. When was it, & what did he say?
Answer. It was in the month of Feb'y last, I think, Maj. Morse presented the amount, & said they were settling up, & wanted me to settle, but did not settle at that time because he had no bill.
Question. Did this delivery of flour settle the bill?

Answer. It more than settled it, there being some $3 00 coming
132 to me, & he paid me it at the counter of his store, (Morse's store.)

Cross-examination.

Question. At the time you settled with Maj. Morse, do you know in what capacity he was acting?
Answer. I don't know anything in regard to it at all.

Question. How many bushels of wheat were delivered by Morse's order, & how many bushels were delivered by Dunphy's order?

Answer. There was in the neighborhood of 74 bushels delivered by Morse's order, and the remainder I was authorized by Mr. Chestnut to receive from parties for Dunphy.

O. E. PENWELL.

T. H. Kleinschmidt was then sworn on part of plaintiffs, and testified as follows, under objection:

In 3 judicial district, Lewis & Clark County, Montana Territory.

133 T. H. KLEINSCHMIDT ET AL.
vs.
BENAJAH MORSE & E. M. DUNPHY. } Exception.

Plaintiffs produced one T. H. Kleinschmidt, one of the plaintiffs in this case, and had him sworn.

Then plaintiffs proposed to prove by said T. H. Kleinschmidt that Elkana Morse, one of the firm of E. & B. Morse, about the last of October, 1867, showed him an instrument of writing purporting to be signed by E. M. Dunphy, and to prove by said Kleinschmidt the contents of the same.

The contents of which, as claimed by plaintiffs, were to the effect that E. M. Dunphy agreed to cancel the mortgage in question whenever they, the Morses, wanted him to do so.

Defendant Dunphy admits plaintiff served a notice on him and
134 the atty's of B. Morse in this action to produce an instrument in writing of the kind and character above mentioned, but denies that any such instrument was ever executed or signed by him, and denies that any such instrument or agreement is, or ever was, in existence, and objects to any oral testimony as to the contents of any such instrument.

Court overrules objection & permits witness to testify as to contents of such instruments.

To which ruling defendant Dunphy excepts.

HIRAM KNOWLES, *Judge.*

The above exception was presented by def'ts' att'ys, and signed by the judge on the 7th of April, 1869, being the day this statement was settled by the judge.

And testified as follows:

I had a conversation with Elkana Morse, one of the firm of E. & B. Morse, in latter part of October, 1867. Elk. Morse showed me an
135 agreement between *between* E. M. Dunphy & E. & B. Morse, in which Dunphy agreed to cansel a certain mortgage made by him whenever E. & B. Morse wanted Dunphy to do so.

This paper was signed E. M. Dunphy. I recognized the handwriting as Dunphy's. I think the amount of mortgage was stated, but don't recollect. I think the body of the instrument was in the handwriting of Elkana Morse.

(Plaintiffs offer to prove the declarations of Elkana Morse not made in presence of Dunphy, so far as such declarations are connected with and had a reference to the transaction between Morse & Dunphy, on the ground that sufficient evidence of collusion between Morse and Dunphy had been established to admit such evidence.

136 To the introduction of which testimony defendants objected. Objection of defendants overruled by court.

To which ruling of court defendants excepted.)

Elk. Morse consulted me one day about buying some goods; told me that the debt due my uncle in St. Louis would be paid; that he was about to purchase some goods from Dunphy, and was to pay for them in flour to be delivered by January 1st, 1868. He said the farmers in the valley were owing him, and could pay him in grain, and that in that way he could pay Dunphy the flour he owed him, while he would sell the goods for cash, and could thus pay a debt he owed my uncle in Saint Louis, and to the collection of which I was attending. He told me in the same conversation that he thought the Hamilton and

137 Herron suit was going against him.

It was the next day he told me he had executed a mortgage on all his property to Dunphy, and that he did not intend that Hamilton & Herron should make anything out of him; but the mortgage was not intended to affect his other creditors, and that he was going to take the mortgage with him, and would not put it on record unless in case of emergency. He said we not be afraid about our Saint Louis claims; I was then. He showed the agreement I have spoken of. He said this agreement would secure him against Dunphy, and the mortgage would keep Hamilton & Herron off, but that all of our indebtedness should be paid. He stated he had purchased six or seven thousand dollars'

138 worth of goods from Dunphy. He said he was to pay it in flour. I told him I wanted him to get Dunphy to come up and acknowledge the agreement, to cancel the mortgage before me, as I was a notary public. He said he did not like to call on Dunphy; he would keep the agreement & mortgage both in his possession, & considered himself safe. This was the last conversation I had with him. I think he left in a day or two afterwards. In the first conversation I had with him he spoke about having purchased six or seven thousand dollars' worth of goods from Dunphy, but do not know if he had then concluded his purchase with Dunphy, and he told me, the last conversation I had with him, that his property was worth forty-five thousand dollars.

I am the nominal plaintiff. I never paid anything on the in-

139 debtedness sued on; I never agreed to pay any amount; I got the claims from my uncle; have never paid anything on them; I am not certain whether judgment sued upon was $16,000 or $18,000 dollars; held debt for collection when I had conversation with Morse. He knew I was a relative of the parties; had spoke to him about the debt before. Morse said, when he showed me the agreement I have referred to, that probably the suit of Hamilton & Herron would go against them. He said he wanted to keep Hamilton & Herron from making anything out him; said he had made purchase, or was about to purchase. The agreement was written on a piece of paper about half of a letter sheet; there were no witnesses to it; do not know its date; I am certain it was dated; it was not stamped; think it was written in ink.

140 He generally bid me good-bye when he left town. I think it was not over a day or a day and a half after this conversation that he left town; but do not know when he left town, as this was the last conversation I had with him.

(To all of the foregoing testimony of plaintiff Kleinschmidt as to the declarations of Morse and conversations between plaintiff and Morse in the absence of defendant Dunphy, defendant Dunphy, by his att'ys, then and there objected.)

Court overruled objection.

Defendant then and there excepted to the ruling of the court.

And here, by agreement between the parties, by permission of the court, it was understood that defendant Dunphy objected to the offering or introduction in evidence of the declarations of E. Morse or B.
141 Morse, or either of them, made in the absence of defendant Dunphy, affecting the validity of the note & mortgage in question, the amount for which it was given, the manner of its payment, and the amount of indebtedness due, or to become due, or owing from E. & B. Morse to E. M. Dunphy by virtue thereof.

The objections of defendant Dunphy overruled by the court.

Excepted to by defendant Dunphy.

And it was then and there understood that defendant Dunphy excepted to any and all the declarations of the Morses, or either of them, made in the absence of defendant Dunphy, as incompetent testimony.

Hugh Kirkendall was sworn on the part of plaintiff, and testified as follows:

Elk. Morse, in Nov., 1867, asked me what I would haul 1,000
142 sacks of flour to Helena for. Said he would have it ground at different times. Said to me he was to deliver 1,000 sacks of flour to E. M. Dunphy by the 1st of Jan., 1868, & he was afraid he would not get it in time. Said that amount of flour would square him with Dunphy. Said that 1,000 sacks flour would square him with Dunphy. At Virginia City, Dec. 19, I paid Benajah Morse $9,000 [dollars.] Elk Morse was killed Dec. 4th.

On the 19th or 20th November, 1867, Elk. Morse told me that the 1,000 sacks flour he owed Dunphy and the $9,000 I. Kirkendall owed them, together with the goods they had on hand, would square them (the Morses) with the world. Benajah Morse told me Jan. 17th or 20th,
1868, at Morse's store, that those dam'ed Dutch in Saint Louis
143 were coming down on him for their money, and everything had gone to the devil; that Dunphy had got everything. I went there in the morning early. There were three men in the store. I think there sits one of them, (pointing to Mark Leadbetter.). He said he had to trust to some person, & Dunphy had never gone back on him yet. This conversation occured outside of the store, when no one was present but Morse & myself; were intimate, and the conversation came up in response to my question as to how he was getting along. Benajah Morse had told me at Virginia, when I paid him $9,000 00, that he would perhaps need my mule train to haul a thousand sacks of flour to Mr. Dunphy, in Helena; that they owed Mr. Dunphy 1,000 sacks of flour for some goods he had let them have. I called on him at the
144 store, at the time just mentioned, to see when he would want the flour delivered. He said part of the flour had already been delivered, and that when the balance was shipped he would perhaps send it wer[illegible]y my teams. In the latter part of November, 1867, at Morse's store, I A[illegible]ad a conversation with Dunphy. He asked me whether I would pay Mor[illegible]forse at Helena or Virginia. He said his reason for asking was that tle [illegible]e would be likely to get some of the money when it was paid. catt

(Kleinschmidt re-called: See preceeding blank page.)

(Amendment to line 14, page 144:) I was familiar with the signature of E. M. Dunphy. I had been acting as cashier of the 1st National Bank of Helena, and had paid out money upon checks drawn by Dunphy. It

was necessary to be very familiar with a signature, to pay out money upon it.

Plaintiffs offered deposition of J. W. Grannis:

Question. State your name, age, & place of residence.

Answer. John W. Grannis; age, 39 years; Bozeman, Gallatin County, M. T.

Question. Where did you reside during the fall & winter of
145 1867 and spring of 1868, and what was your business during that time?

Answer. I resided at Gallatin City, & was engaged as miller at the Madison Mills.

Question. State whether or not you had any business transactions, while at the Madison Mills, with the firm of E. & B. Morse.

Answer. I had none only as a miller. I was grinding flour for them.

Question. State when these transactions, & all concerning them that you know, occurred.

Answer. Morses came to me either the last of October or the first of November, or thereabouts, and stated that they wanted to get a thousand sacks of flour ground as soon as possible; that they were under contract to deliver a thousand sacks of flour at Helena to Dunphy & Bently by the first day of January, 1868. I think that it was
146 Elk. Morse that made this statement. He (Elk. Morse) gave me to understand that he had bought a bill of goods from Dunphy to that amount, & had to deliver this flour by the first of January, or expected that Dunphy would raise hell with him. I asked Maj. Morse whether they would send good wheat, & he said that he would; that he had a good deal standing out in the valley the shape of accounts, which he wanted to collect in wheat, & he wished me to reserve a little back-room in the mill for storage, as we was crowded at the mill for room; that he wished me to dock the wheat, provided it was not good so that 3 bushels would make a sack of flour. Morses were there several times after this during the month of November, and always seemed anxious to have this 1,000 sacks of flour ground.

147 Question. How many bushels of wheat did the Morses deliver, which was to be delivered in flour to Dunphy.

(Objected to by def't att'y.)

Answer. There was something like 2,000 bushels or over delivered; the majority of that was delivered on account of the Morses; some of the last of the wheat delivered was credited to E. M. Dunphy. All the wheat delivered up to about the middle of March was credited to E. & B. Morse, after that to E. M. Dunphy.

Question. How many sacks of flour were delivered to E. M. Dunphy on this Morse account?

Answer. In the neighborhood of 600. I think a little over.

Question. How was this flour delivered to E. M. Dunphy?

Answer. A portion of this flour were shipped by the Morses' teams, & the balance by outside freighters.

148 Question. You state that this wheat was delivered [on accoun on accounts due Morse & Morse; do you or do you not know fro what places this wheat was delivered?

Answer. I know from where part of it was delivered; part of it wa brought down from the store; quite a number of farmers in the valley brought small lots; & there was 6 or 700 bushels delivered from Morse's ranche.

Cross-examination.

Question. State how much of the 2,000 bushels of wheat was delivered on the account of Morses, and how much on the account of Dunphy?

Answer. I can't say without the books; I think there was 5 or 600 delivered on the account of Dunphy; the balance was delivered on account of Morses.

149 Question. How do you arrive at the number of bushels of wheat & sacks of flour mentioned in your testimony?

Answer. I drew the account from the grist-book for the receiver; I have not retained a copy of this account, or I could tell to a sack or a bushel.

Question. State whether or not the account you have here given is given from memory, since last spring.

Answer. It is, sir.

Question. State whether, in the conversation referred to with E. & B. Morse, both said E & B. Morse were present during the entire conversation?

Answer. They were both present most of the time; that portion of the conversation referring to the quality of the wheat & the accounts they had in the valley was with Benajah Morse. Elk. at the time was

150 talking with Mr. Fredericks. After Elk. was through talking with Fredericks, he came to me again, & he was then speaking about the collections of the accounts & wheat, & it was then he made the request to have the wheat docked; at this time they were both present.

Question. How do you know that in the neighborhood of 600 sacks of flour were delivered to E. M. Dunphy on the Morse account, as you have testified?

Answer. I drew the account from the mill-book for the receiver last spring.

Question. How do you know that it was delivered to Dunphy?

Answer. We shipped it to Dunphy in Helena to his order. He was there at the mill once or twice to see about it. I had no con-

151 versation myself with Mr. Dunphy; he conversed with Mr. Fredericks.

Question. State whether you heard Mr. Dunphy conversing with Mr. Fredericks about the delivery of the flour?

(Objected to.)

Answer. I did not hear this conversation, but have Mr. Fredericks' authority for it.

Question. State how you know that there were 6 or 700 bushels of wheat of the aforesaid 2,000 bushels delivered from Morses ranche?

Answer. Mr. Seagrass, who was delivering wheat for Morse, told me that one lot of wheat that was brought there was from the Morse ranch, & there was 6 or 700 bushels in the lot.

Question. State whether or not the foregoing figures or am't are from memory.

Answer. They are.

152 Question. How do you know that said 2,000 bushels of wheat was delivered on account due Morse & Morse?

Answer. I only know from what the Morses told me, & from parties that delivered the wheat there. Some of the parties delivered small lots of wheat stated that they were delivering for Morses in payment on some accounts due Morse.

Question. Is that all your means of knowledge in relation to said wheat being delivered on accounts due Morse & Morse?

Answer. Yes, sir; it is.

Question. How much of the 600 sacks of flour were shipped by the Morses' teams, & what balance by outside freighters?

Answer. I think Morses' teams loaded once with about 100 sacks, and the balance were shipped by outside freighters.

153 Question. Do you know that these 600 sacks of flour were delivered to Dunphy, at Helena, by these freighters?

Answer. I saw receipts returned for part of the amount, but not for all.

Question. At what time were 600 sacks of flour shipped to Dunphy, at Helena?

Answer. At various times from about the middle November, 1867, to the first of May, 1868.

JOHN W. GRANNIS.

H. Comley, sworn on part of plaintiffs, testified as follows:

About 1st Jan., 1868, the goods in store of Morses was of the value of from $12,000 to $15,000, [dollars;] the accounts on books, from $10,000 to $15,000 [dollars.] My information of the value of the goods is from
154 the examination of the stock in store—about half hour; I did not invoice them. My information of the amount of book accounts is from an examination of the same during my stay there, from half to an hour, and running up the amount on the books in conjunction with Mr. Terrell. I was there for the purpose of securing the claims of the pl'ffs by attachment, and made the examinations above mentioned of goods and accounts, for the purpose of ascertaining if pl'ffs' debt could be made. The above estimate are in gold-dust. I am familiar with goods, having been engaged in the mercantile business for several years.

E. Terrell testifies to the same as above testified to by H. Comley:

I was then deputy sheriff of Gallatin County; I know that at that time, Jan'y 1st, 1868, I could have collected the entire amount of
155 pl'ffs' claim, even at a forced sale, if the property of Morse had not been encumbered by the mortgage of Dunphy.

Anders, on part of plaintiffs, testifies as follows:

Was clerk for Dunphy in October 1867; was present when a contract was made between Dunphy and Morse, of goods for flour, to be delivered January 1st, 1868. The contract was made at store; may have been on street; do not remember date of contract; I am of the impression contract was on writing; do not know that the contract was changed. I am positive the flour contract between Dunphy and E. & B. Morse was consummated the evening before, or the morning the Morses left town for Gallatin; that is, if copying the contract was a consum-
156 mation; I think it was the morning they left. I went down to Gallatin County with E. & B. Morse, in a wagon, and I know they talked all the way down about how they were going to secure flour to fill their flour contract with Dunphy. I did not hear anything about the contract being done away with, or about a mortgage to Dunphy.

Deposition of J. C. Chance:

Question. State your name, age, & place of residence.

Answer. J. C. Chance; age, 25 years; reside at Fort Ellis, M. T.

Question. What was your position [your position] at F't Ellis on the 20th of September, 1867?

Answer. Acting ass't Q. M. and act. commissary of subsistence.

Question. State whether or not, while in that position, you had any business transactions with E. M. Dunphy.

157 Answer. I did.

Question. What were they?

Answer. I entered into a contract with E. M. Dunphy for furnishing the post of F't Ellis with fresh beef for one year from the 1st of October, 1867, to last of September, 1868.

Question. State how this beef was delivered?

Answer. During the first 2 months the beef cattle were driven to the post by Mr. Wolverton, who was acting as Mr. Dunphy's agent at that time, & the cattle were butchered by a soldier for a month or two; after that time the cattle were butchered in Bozeman, by whom I know not, until I was relieved as commissary, on the 9th day of January, 1868.

Question. State whether or not you paid Mr. Dunphy any money on this contract.

Answer. I did; but have forgotten the exact am't; it was
158 about $700 00.

Question. Who succeeded you as commissary?

Answer. 1st Lieut. M. O. Codding, 13th Inf. U. S. A.

Cross-examination.

Question. Was any other person known in said contract for furnishing beef besides E. M. Dunphy; and, if so, whom?

Answer. I recognized no other party except Mr. Dunphy; only I heard that the contract had been turned over to Mr. Sims, & re-transfered to Mr. Dunphy.

Question. State at what date the aforesaid contract for beef was entered into.

Answer. It was entered into on the 20th of September, 1867, to commence delivering beef the 1st day of October, 1867.

Re-direct ex.

159 Question. For what length of time was this $700 00 of which you speak paid for furnishing beef?

Answer. Paid him voucher for one month, and the balance for November & December was $700 00, paid in checks.

J. C. CHANCE.

M. O. Codding's deposition read by plaintiff:

Question. State your name, age, & place of residence.

Answer. My name is M. O. Codding; age, 28 years; am stationed at F't Ellis, M. T.

Question. What position are you holding at F't Ellis, & how long wer[illegible]ave you held the same?

A Answer. I am 1st Lieut. of the 13th U. S. Inft., & act. ass't Q. M. &
Mor acting commissary of subsistence, & have held the position of
tle) Q. M. & act. C. S. since January 9th, 1868.
catt Question. In your official capacity, have you had any business
nsactions with E. M. Dunphy?

(Objected to.)

Answer. I have.

Question. State what business you have had with him.

(Objected to.)

Answer. I received fresh beef from him for the supply of troops at F't Ellis.

Question. State whether or not you have paid E. M. Dunphy any money.

(Objected to.)

Answer. I have paid him some money.

Question. State for what, & how much you paid him.

Answer. I paid him for fresh beef; can't say how much; haven't the books with me. I think I paid him about $4,500 00. This
161 amount paid part in currency & part in checks on the U. S. depository at S't Paul & Chicago.

M. O. CODDING,
1st Lieut. 13th Inf't'y.

Henemeway, on part of plaintiffs, testified as follows:

I was employed at Madison Mills Nov. 1st, 1867. Morses were there, and said they wanted some flour; they said they had bought a bill of goods of Dunphy in Helena, and were to deliver him a thousand sacks of flour in payment, by Jan'y 1st, 1868, or were to pay $10 00 a sack for what they failed to deliver by that time; they seemed very anxious to get the flour in time, and spoke to me several times about it. Elk. Morse helped me, December 3d, 1867, about half day to clean out
162 ice for the purpose of keeping mill running, so as to furnish the flour in time.

W. J. Smith (for plaintiffs) deposition:

Question. State your name, age, & place of residence.

Answer. W. J. Smith; age, 25 years; reside ½ mile east of Morse store.

Question. Have you ever had any dealings with the firm of E. & B. Morse?

Answer. Yes, sir.

Question. Was Morses' store opened all of last spring?

Answer. No, sir; it was not.

Question. When, & how long was it closed?

Answer. I couldn't say.

Question. Were you ever employed by the Morses, their agents, or employees, to drive cattle?

Answer. Mr. Seagrass employed me to drive cattle for him.

163 Question. When was it that Mr. Seagrass hired you, & what cattle were you to drive, & to what place were you to drive them?

(Objected to.)

Answer. I think that it was in February; he did not tell me at the time where they were to be driven to. Mr. Jones was with the cattle; he said that they were to be driven this side of Virginia, near the 8-mile house; we got the cattle from Morses' ranche, and we started them from there about dusk; we came up the river and crossed at Mr. Ne' son's Crossing; we drove on out to the Dry Hollow, & camped about o'clock at night, and the next day we drove them from there to C: nady's bridge, on the Madison. I left the cattle there and came ba

Question. How many cattle were there in that herd, & what k were they?

164 Answer. There were sixty-three (63) head of fat cattle; the might have been one or two that was thin in the herd.

Question. What time was it when you crossed at Nelson's Crossing, & what was the condition of the river at that time?

Answer. I judge it was about 9 o'clock; between 8 & 9. The water was running over the ice considerable; the ice on this side was getting pretty thin.

Question. Did you, in January last, live on the road to Morse's ranche?

Answer. Yes, sir.

Question. Do you remember, in January last, a wagon passing your house in the night, or any sleighs passing in the night, driven by Mr. Seagrass?

(Objected to.)

Answer. I recollect a wagon passing twice during the night;
165 didn't see who was driving it. I saw sleighs passing frequently in the day-time.

Question. Who drove these sleighs?

Answer. Mr. Seagrass generally drove; sometimes Mr. Sill.

Question. Was there anything in the sleighs?

Answer. There was something in the sleighs covered with blankets.

Question. Where were these sleighs going to?

Answer. I could not say exactly where they were going to; they were going in the direction of Morses' ranche.

Cross-examination.

Question. What was your object in starting to drive the cattle in the evening?

Answer. Mr. Seagrass said he was afraid the ice would break up in the river & he could not cross them.

Question. State if you know whose cattle they were.

166 Answer. They were Mr. Morse's cattle.

Question. How do you know they were Morse's cattle?

Answer. They were branded with his brand, & cattle that had been over there for a year & better.

Question. Do you know whether or not they had been sold prior to this time?

Answer. I do not.

Question. In your direct examination you stated that you live on the road to Morse's ranche; does the road lead to any other ranche?

Answer. It leads across the river; you could go to other ranches on the other side.

Question. Do you know where the sleigh went to you saw?

Answer. I do not.

Question. Are you acquainted with Hugh Kirkendall?

(Objected to.)

167 Answer. I can't say that I am acquainted with him; only know him when I see him.

Question. Did you meet him during the time you were with the cattle you speak of?

(Objected to.)

wer Answer. No, sir. I don't recollect of seeing Mr. Kirkendall at all.

A W. J. SMITH.

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catt H. Brewer's deposition for plaintiff:

Question. State your name, age, & place of residence.

Answer. Hezekiah Bremer; age, 30 years; reside in Gallatin Co., M. T.

Question. Have you ever dealt with the firm of E. & B. Morse?

Answer. Yes, sir.

Question. Have you ever had a settlement with them?

Answer. Yes; settled & gave a note.

168 Question. Did you ever settle with them for the note?

Answer. Yes, sir.

Question. When & how was this settlement made?

Answer. Last winter I had some money sent to me from F't Smith by Mr. Story, which was $350 00 in greenbacks. It was sent to Morse's store, & Maj. Morse gave me credit for it on the note, which left a balance still due on the note. He then came to me at home, or out on the prairie, & dunned me for it. He agreed to take wheat for the remainder, & the wheat did not hold out. It was about the 20th of April, 1868, that the wheat was delivered at the Madison Mills; that still left a little balance, which he agreed to take oats for. The oats fell short, & I paid a dollar or two in money & lifted the notes. Mr. Leadbetter

169 received the money & the oats & handed me the note.

Cross-examination.

Question. When was this note given that you speak of?

Answer. It was about a year ago—before the 1st of January last.

Question. To whom was the note made payable?

Answer. To E. & B. Morse.

Question. When did you receive the money from Story that was paid on the note you speak of?

Answer. The money was brought to the store about January, 1868. I knew nothing of its being at the store for two or three weeks after it arrived.

Question. How do you know the money arrived here about the first of January?

Answer. Mr. Story told me that he had left it.

170 Question. Do you know in what capacity Mr. Leadbetter was acting at the time you [you] settled, and he gave you your note?

Answer. No, sir.

Question. How came you to settle with Mr. Leadbetter?

Answer. By order of Mr. Morse.

H. BREMER.

Joseph S. Wilson testified on part of plaintiffs:

Was miller at Madison Mills in fall of 1867. Elk. Morse wanted to get 1,000 sacks of flour ground by 1st January, 1868. Said he wanted it to pay for goods he had been buying of E. M. Dunphy. Settled with Morse about the middle of Jan'y, 1868. Hard to tell whose property it

171 was at that time. Dunphy told me I had better settle up my matters before the sheriff levied on everything. Morse & Sill were in the store at the time. Sill was an old clerk of Morse's; had been since 1866. I went to settle with Morse for the purpose o' getting my account off the books before it was attached by the sheri' as I did not want the matter involved in a law-suit. Morse and I cou not agree upon the amount of my account. I thought his bill was t' large, but he told me to give my note for the amount, and thus get th account off the books, and he would make the matter right at any futu time if the amount was too large. He drew my note payable to Dunphy Had a conversation with Benajah Morse at the time I went to settle my account in the middle of January, 1868, as above mentioned, and told him he had better administer on the estate of Elk. Morse, deceased; that in this way he would get a year's time upon the debts owing by

172 E. & B. Morse; that I thought he was taking desperate chances in the way he was doing his business. He answered that he was bound to have a friend; that he must trust somebody. He said he did not want to pay the judgment Elkanah Morse's wife had against him. I was there several times in January. Saw Sill and Morse & Kreitzer at the store. The same persons were there in January that were there before. In February and part of March store was closed. When store was opened in March, Leadbetter had charge. When I was there in January, 1868, Col. George and Col. May was there. Col. George told the sheriff he had a right to levy, & Col. May told him he had no right to levy. Dunphy told me he had bought everything. I bought goods of Dunphy there afterwards.

173 J. R. Pearson's deposition read by plaintiff:

Question. State your name, age, & place of residence.

Answer. J. R. Pearson; age, 26 years; reside about 3 miles below Morses' store.

Question. Where were you living last fall & winter?

Answer. About 2 miles from Morse ranch.

Question. How much land is there in Morse ranch, & what is the value of it?

Answer. I don't know.

Question. Is any of this ranch inclosed?

Answer. A part; probably a hundred acres being enclosed.

Question. Was any part of this ranch broken up or cultivated last year?

Answer. I should judge there was near 80 acres; it was planted with wheat, oats, & barley. I could not say how much of each kind;

174 mostly wheat.

Question. What would you judge this crop to be worth?

Answer. I should think that all kind of grain would average 20 bushels to the acre, & would be worth, after harvesting & threshing, $2 00 in dust per bushel.

Question. What would be the costs of cutting, threshing, &c.?

Answer. It cost $5 00 per acre for cutting and shocking, and $4 00 per for threshing; & $1 00 per acre for hauling & stacking; about 75c. per acre for extra labor.

Question. Were there any cattle on the ranche last fall?

Answer. There was, some time in October.

Question. About how many cattle were there, what kind were they, & what was there value?

Answer. Somewhere near a hundred head mixed cattle; a good

175 many work cattle among them, and some cows; can't tell their value.

Cross-examination.

Question. Do you know of your own knowledge whose cattle they were?

Answer. I can't say that I do, of my own knowledge; knowing where Morse cattle generally run, & knowing that no other large bands of cattle were in that part of the country, I supposed them to be Morses' cattle.

J. R. PEARSON.

W. A. Fredericks' deposition read by plaintiffs:

Question. State your name, age, & place of residence.

Answer. My name is W. A. Fredericks, & am 40 years of age; my place of residence in Gallatin City, M. T.

Question. What is your business in Gallatin City?

176 Answer. I am millwright at the Madison Mills.

Question. Do you remember having had a conversation with the Morse brothers at the Madison Mills, some time last fall, after the Herron suit? If so, state the conversation.

(Objected to as leading & incompetent.)

Answer. I had a conversation with them at the Madison Mills, &, from hearsay, it was after the Herron suit; the conversation stated over there was that he had bought a large amount of goods from Mr. Dunphy, & wanted to get as much wheat ground immediately as he could, to be shipped to Mr. Dunphy.

Question. How much wheat, during the time you were there at the mill, was delivered on this account, which, after ground, was to be shipped to Mr. Dunphy?

(Objected to.)

177 Answer. Whilst I was there, there was over a 1,000 bushels came into the mill up to the time the receiver came in; after that I don't know anything about; there was no shipments of flour whilst I was in the mill.

Question. State whether your estimate of over 1,000 bushels might not reach 2,000 bushels.

Answer. No; I don't think it would reach 2,000 bushels, as it was all in one room.

Cross-examination.

Question. Do you know of your own knowledge what number of bushels of wheat, if any, were delivered by Morses at the mill, to be made into flour & shipped to Dunphy to pay for goods purchased?

Answer. I don't know anything of my own knowledge.

W. A. FREDERICKS.

178 R. P. Vivion' deposition read by plaintiffs:

Question. State your name, age, and place of residence.

Answer. R. P. Vivion, Gallatin Co., M. T.; age, 29 years.

Question. What was your business during the latter part of the year 1867 and the first part of 1868?

Answer. I was acting as receiver in the Madison Mills, Gallatin Co., M. T., from the 5th day of Dec., 1867, to the 25th of June, 1868; have also been county clerk & recorder of Gallatin Co., M. T., from November, 1866, to the present time.

Question. During the time you acted as receiver, state whether or not the firm of E. &. B. Morse had any wheat ground at the Madison Mills.

Answer. They did.

Question. State, if you know, when this wheat was delivered,

179 & how much there was of it.

Answer. There was in the neighborhood of 500 bushels in the mill, when I went there, belonging to E. &. B. Morse; they continued to deliver from time to time, until about the first of March; the exact amount I don't remember.

Question. State whether or not there was any wheat delivered in the name of E. M. Dunphy; if so, when and how much was delivered.

Answer. There was about 5 or 600 bushels delivered between the time of the 1st of March & the 1st of May, 1868.

Question. State whether or not any of this wheat delivered in the name of Dunphy was delivered by the Morses, or their employees, or agents.

Answer. There was none delivered by the Morses; the men
180 delivering it were men claiming to be employed by Dunphy, and from farmers claiming to be delivering it for Dunphy, and I receipted to Dunphy for the wheat.

Question. Do you know anything of a mortgage on the Morse property?

(Objected to.)

Answer. I have seen it.

Question. State what you know about it.

(Objected to.)

Answer. The mortgage came into my office, I think, about the 1st days of November, 1867. I was absent at the time it came, but think I arrived at the office the next day. Mr. Edwards had taken the acknowledgement of the mortgage. I doubted whether a deputy sworn in by a deputy could acknowledge the instrument, and I took the mortgage to the Morses' store, & took thier acknowledgement myself, & return
181 the mortgage to the office, & it was recorded.

(Answer objected to.)

Question. State in whose favor this mortgage was drawn, and for what amount.

(Objected to.)

Answer. In favor of Dunphy, & for $30,000 00, (thirty thousand dollars.) I am not certain as to the amount.

Question. State whether or not the record of this mortgage was ever altered or amended.

Answer. Not to my knowledge.

Question. Do you know of any other incumbrances on the Morse property besides this mortgage?

(Objected to.)

Answer. There is a transcript of judgment on record in favor of (I think) Kleinschmidt & Duer, both. Those are all the incumbrances up to the former trial of this case.

(Obj.)

Question. Do you remember a certificate of record being pro-
182 duced on a former trial of this case at Bozeman?

(Obj.)

Answer. There was such a certificate.

Question. Did that certificate embrace the facts as they appeared upon the record of Gallatin County in your possession?

Answer. It did at that time.

Question. Were you in the Morse store in November last?

(Obj.)

Answer. Yes, sir.

Question. State whether or not, when you were there in November, there was any difference in the appearance of the stock of goods from any other time.

Answer. I was there but a short time, & did not notice any difference, as I had not been there for several months before.

Cross-examination.

Question. How do you know how much wheat was in the mill
183 when you went there?
(Obj.)
Answer. I made an estimate of the amount in the mill, and think there was about 2,100 bushels, as near as I can get at it; this does not include toll-wheat.
How do you know what amount belonged to E. & B. Morse?
Answer. This wheat was all in one cabin belonging to the mill, except a small portion in the mill, & the number of bags was on the book, & I had to judge from the number of bags; the wheat was not weighed yet, except that in the mill.

Re-direct ex.

Question. To whom was the wheat delivered by Morses after it was ground into flour, delivered?
(Obj.)
Answer. The flour was sent to E. M. Dunphy. I took freight-
184 er's receipt to be delivered to E. M. Dunphy. The bran & shorts was delivered to various parties who came to the mill for Morses' bran & shorts.

Cross-ex.

Question. Who sent the flour to E. M. Dunphy?
Answer. The Morses ordered it sent.
Question. When was it sent?
Answer. It was sent at various times during the winter.

R. P. VIVION.

E. Terrell re-called by plaintiff:

Morse had a good deal of property on ranch; I think I could have collected the Klienschmidt & Duer execution, if it had not been for the mortgage of Dunphy. The Morses brought the mortgage down to
185 Gallatin County, and left it on file in the office of the county clerk without being ackuowledged. When I returned to the office, and found that mortgage had not been acknowledged, I sent it up by Mr. Vivion to Morses' store for the purpose of having it acknowledged before record. Elk. Morse told me, shortly after he returned from Helena, that if Herron sued him for damages, his mortgage to Dunphy would set all such suits aside.

A. G. P. George testified as follows for plaintiffs:

Had conversation about 20th December, 1867, with E. M. Dunphy, at Bozeman; Dunphy showed me mortgage; I said I was surprised Morses owed so much as $30,000 [dollars.] Dunphy told me the mortgage was for ten thousand dollars' worth of goods, to be paid in flour. I
186 saw in Jan., 1868, band of cattle on Morses' ranch. I think about 200 head, which I judged to be Morses' cattle, embraced in the mortgage to Dunphy; all that I noticed had the Morse brand upon them, and they would average about $60 00 per head. There were also about seventy-five cows and young stock upon the Morse ranche, besides the 200 head of cattle I have mentioned. Besides these, there were about

34 head of cows, which Dunphy sold to Kratzer. The cows were all worth from $50 to $75 per head. The above lots of cattle were, I know, still on the Morse ranch about the middle of Jan., 1868, after Dunphy claimed to have taken possession. In April, 1868, I had a conversation with Dunphy; I charged him with having already told me, at
187 Bozeman, that the Morses only owed him $10,000 00, to be paid in flour, which he never denied. I was in Morses' store several times during the month of January, 1868; I saw no difference in the way it was carried on, or in the persons carrying it on, than there was before Jan'y. Morse and Sill still run the store as usual. I was also in the store several times in March and April; I often saw Morse in the store during that period, selling goods as before. Do not know that Dunphy made any admission as to receiving any portion of the property. This mortgage prevented me from collecting the Kleinschmidt & Duer judgments. I noticed that the Packer sign in January, 1868, was taken down, and Dunphy's sign placed in its stead. My conversation with Dunphy was with a view to settlement.

W. Alexander:

188 I am deputy sheriff of Lewis & Clark County, M. T.; was in May, 1868. I levied on 941 sacks flour in Dunphy's cellar. It was principally territorial brands, more branded than not branded.

Deposition of John W. Moffitt read by plaintiffs:

Question. State your name, age, and place of residence.

Answer. My name is John W. Moffitt; and am thirty-eight (38) years of age; my place of residence, Gallatin County, Montana Territory.

Question. State if you are acquainted with E. & B. Morse.

Answer. I am.

Question. State if you were at the store of E. & B. Morse at any time during the latter part of the year of 1867 and in the first part of 1868; and, if so, when.

189 Answer. I was there in June, August, & September of 1867, and on the 10th and 11th of January, A. D. 1868, and the 3 or 4 of May, 1868; also January 2nd or 3, 1868.

Question. State who was there at the times you mentioned, in the year of 1868.

Answer. Maj. Morse and Sill was there the first time, and Maj. Morse, Sill, and Dunphy was there the second time, Jan'y 10th & 11th; and the third time, which was in May, Maj. Morse, Sill, & Leadbetter, Dunphy, Col. George, & Kritzer was there.

Question. State what, if anything, Maj. Morse was doing at the store when you saw him there in Jan'y & May.

Answer. When I was there in Jan'y Maj. Morse was selling goods, and had charge of the store; and on the 4th of May (I think) 1868, I
190 came up from Gallatin City to the store of Morse; I went into the store and E. M. Dunphy was sitting on the outside of the counter, and Maj. Morse was sitting behind the counter, and appeared to be settling up some accounts; I also saw him, Maj. Morse, selling goods to customers on the 4th day of May, 1868.

Question. State if you have ever seen Maj. Morse since the 4th day of May, 1868, and if you know what has become of him.

Answer. I have not seen him since the 4th day of May, 1868. I first heard that he had gone to Virginia, and afterwards heard that he had gone to the States.

Question. State what was the appearance of the stock of goods in the store when you saw it in Jan'y, 1868, and also in May, 1868.

Answer. It was a very full store in January, 1868; had a large
191 stock of goods in it, and was about the same in May, with the exception of a few calicoes more then. It was fuller in January and May, 1868, than when I saw it in 1867.

Question. State if you know the value of Morse's storehouse & lot.

Answer. It is hard to place a value on it, but I consider it worth about one thousand dollars.

Question. State if you are acquainted with Morse ranch, the improvements thereon, and the value of the same.

Answer. I think the improvements thereon are worth about $2,000 [dollars;] it cost about that am't to put them up. I mean the ranch & improvements together are worth that am't.

(The hour of 12 o'clock having arrived, a notice of this fact is hereby entered at the request of defendants' counsel, who then retired,
192 declining to remain during the taking of the balance of this deposition.)

Question. State what the improvements are on the ranche.

Answer. There are two houses, a corral and barn, and I should judge there were about one hundred acres broke, and from one hundred and fifty to two hundred acres under fence.

Question. State if you know anything about what amount of cattle B. Morse, survivor of E. & B. Morse, owned in January, 1868.

Answer. On the 10th day of January, coming back from Helena, I stopped at Morse's store over night. I had made arrangements with E. M. Dunphy for to fill his beef contract at Fort Ellis, and he to furnish the cattle at Morse store or ranche. When I got to the store,
193 there was an order from Bozeman for me to take cattle to Bozeman; this order was from Geo. Dow, my partner in filling this beef contract. I applied to Dunphy for cattle, and I understood from him (D.) that I would have to go to the ranche after the cattle, and received an order for the cattle from Benajah Morse with Dunphy's name signed to it; the order was directed to Eb. Morse for ten head of cattle, which he delivered on this order, and while there (on Morse's ranche) I saw a band of cattle embracing about two hundred head, more or less. I asked Sill, who was helping me to drive the cattle from the ranche, if those cattle on the ranch were Dunphy's cattle. He said that they were the cattle that Dunphy got of Morse, meaning the band of two hundred head to which I have referred. I am satisfied that this band of
194 cattle were about two hundred head.

Question. State what kind of cattle this band was composed of, and what they were worth.

Answer. They were all beef cattle, as far as I observed. There might have been some cows among them. As to the value of the cattle, I can only say that the ten head that I got were worth about sixty dollars a head, and I considered them the poorest in the lot. Mr. Sill also stated that the ten I got were the poorest in the lot, and that on that account he wanted them killed, as they were falling off every day. I think the band of cattle would average at a low estimate sixty dollars a head.

Question. Have you ever seen any other of the cattle embraced
195 in the mortgage from E. & B. Morse to E. M. Dunphy?

Answer. I have seen the cattle known as the Kreitzer cattle. I understand these cattle were embraced in the mortgage from Morse to Dunphy, and sold by Dunphy to Kreitzer. This lot of cattle were somewhere between thirty-five and forty-five head, and were all cows, as far

as I remember. Cows at that time were worth from fifty to seventy-five dollars per head.

Question. Did you ever have any conversation with Benajah Morse at any time in regard to obtaining cattle from him to fill the contract at F't Ellis to which you have referred?

Answer. Yes, I had a conversation with him on or about the last of February, or the first of March. We had got out of cattle; did
196 not send to Morse store for cattle, for I heard the cattle had been off, but I met Benajah Morse in Bozeman, and I asked him if it was so that the cattle had been run off. He said yes; that he did calculate for those fellows to get them; that he would get what I wanted from Story, and gave us an order on Story for other cattle, and we got them. At the time I had this conversation with Morse, the attachments of Kleinschmidt & Duer were in hands of the sheriff of Gallatin County, as near as I remember, and I understood him as referring to those attachments as his reason for running off the cattle, as some of the cattle I had purchased from Dunphy had been attached under them.

Question. Have you ever seen the mules & horses mentioned in the mortgage? and, if so, state their value.

197 Answer. I have seen the twelve mules that were known as Morse's mules. I know them to be Morse's mules and were embraced in the mortgage to Dunphy, and were worth from $125 00 to $150 00 per head. I have seen the mules several times. I have seen part of the horses belonging to Morse; I suppose the same mentioned in the mortgage. I judge the horses and colts to be worth between four and five hundred dollars.

Question. Do you know the value of the threshing-machine mentioned in the mortgage; also the value of wheat per bushel during the year of 1867?

Answer. I consider the threshing-machine worth eighteen hundred dollars in currency, and the wheat was worth two dollars per bushel in dust at the mill.

198 Question. State the terms of your beef contract with Dunphy; when it commenced and when it ended.

Answer. Myself and Geo. Dow, a butcher in Bozeman, made a contract with E. M. Dunphy about the first of Jan'y, 1868. Dunphy had a contract with F't Ellis to furnish beef at twelve and a half cents per pound. Geo. Dow & myself, in our contract with E. M. Dunphy, took this contract off of his hands, and Dunphy agreed to furnish us beef at Morses' store or ranch to fill this contract at F't Ellis, and were to pay him eight cents per pound in gold dust for all the beef which we received from him under this contract. Under this arrangement Dunphy was to furnish us beef from the first of January to the first of April,
1868, Mr. Dow and myself butchering the beef thus received &
199 furnishing it to the fort. Under this contract we received eighteen head of beef cattle from Dunphy at Morse's ranch.

Question. What position did you occupy in Gallatin County during the time that the attachment suits of Kleinschmidt & Duer were pending against Benajah Morse?

Answer. I was deputy sheriff of Gallatin County during that time, under Mr. Gay.

Question. State any facts you may know as to why the plaintiffs were unable to collect their judgments in these cases against Benajah Morse.

Answer. The reason, as I understend it, why the plaintiffs were unable to collect their judgments in these cases was that the entire property of E. & B. Morse was covered by a mortgage from them to E. M. Dun-

phy; that when the attachments were issued in these cases the sheriff was prevented from making a levy by Dunphy laying claim to
200 the property, and forbidding him from making a levy; and after judgments had been obtained and executions issued, Dunphy also prevented the executions from being levied upon any of the property of Morse, still laying claim to it by virtue of his mortgage. I do not think there is any doubt but that the plaintiffs, Kleinschmidt & Duer, could have collected their claims had not the entire property of E. & B. Morse been encumbered by the mortgage of E. M. Dunphy at the time their suits were brought.

Question. Are you acquainted A. T. Baker?

Answer. I am.

Question. State whether or not you heard any conversation between A. T. Baker and E. W. Toole in the latter part of June, 1868; and, if so, state when and where the conversation occurred, and what was said.

201 Answer. In the latter part of June, 1868, I came from Gallatin to Helena with a subpœna for Baker as a witness in this case, & while in Helena, in front of King & Gillette's building, I heard a conversation between Mr. Baker and Mr. Toole, which was substantially as follows: Mr. Toole went across the street to where Baker was, and said to him, "I want to know if Woolfolk did not say to you, damn you, I won't buy you, but if we want you to go to Virginia City we will get out an attachment and make you go." Baker replied that he did, and that was all that was said. Toole started to ask other questions, but Baker said he did not wish to answer any more. Toole then said he did not want to hear any more, and then turned away.

JOHN W. MOFFIT.

202 Deposition of Mrs. Rosa Vantilburg read by plaintiffs:

Question. State your name, age, & place of residence.

Answer. Rosa Vantilburg; age, 28 years; place of residence, Warm Springs, Jefferson County, Montana Territory.

Question. State if you were acquainted with Benajah Morse, one of the defendants in the above-entitled cause.

Answer. I am.

Question. State if at any time you have had any conversation with Benajah Morse in regard to the above controversy & the property involved therein?

(Defendants' counsel objects to the question.)

Answer. I have.

Question. State the substance of said conversation & when & where it occured.

(Defendants' counsel objects to question.)

203 Answer. Mr. Morse & I was in conversation about his brother's death & losses, and I said to him that I supposed that he would save something of his property, and he said he did not know yet, and I said that I supposed that it depended upon Dunphy's success in the suit in regard to the goods in the store and the property in Dunphy's possession. He said he was in hopes that he would save something, but it would keep him out of business so long. Then I said, I suppose that you will go into business again if Dunphy is successful in his suit. He said, yes, he thought he would, that he had been looking at the Crow Creek mines, & thought that he would go into business there. This conversation occured about the middle of March, 1868, at my house.

(All of Mrs. Vantilburg's deposition after line 21, page 203, was suppressed by the court.

CHA'S REYNOLDS, *D. C.*)

Question. State if Benajah Morse said that he would go into business in his own name.

204 (Defendants' counsel objects to question.)

Answer. I said to him that you could not do business for yourself unless your name was free from indebtedness, but that you could transact business for Mr. Dunphy, and he said yes, that he could.

(Answer objected to.)

Question. State if Benajah Morse told you why he could not go into business in his own name.

(Defendants' counsel objects to question.)

Answer. He did not; not more than it depended on the success of this suit.

Question. State if Benajah Morse told you that he would be all right, financially, if Dunphy was successful in this suit.

(Defendants' counsel objects to question.)

205 Answer. I said I supposed you would be all right if Dunphy was successful in the suit, & he said yes, that he would be all right, & thought that he could make a little raise again.

Cross-examined.

Question. Did Benajah Morse ever tell you that Mr. Dunphy was concealing property for his benefit?

(Objected to by plaintiff's counsel.)

Answer. He did not; he said that Mr. Dunphy was a good friend of his, and assisting him all he could.

ROSA VANTILBURGH.

Deposition of S. B. Weddell, read by plaintiffs:

Question. State your name, age, & place of residence.

Answer. My name is S. B. Weddle; am 31 years of age; and reside 3 miles southeast of Morse store.

Question. Have you ever been at Morse's store?

Answer. Yes, sir.

206 Question. Was you there in January last?

Answer. Yes, sir, four or five times.

Question. When at Morse's store wl om did you see there waiting on the store?

(Question objected to.)

Answer. In January I could not say that there was anybody waiting on the store; I saw Morse, Sill, & Seagrass there.

Question. Was the store open in January?

Answer. I can't say whether it was or not.

Question. Was the store closed at any time in January?

Answer. It was.

Question. Were you inside the store any time in January?

Ans. I can't say whether I was or not; I may have been about the first of January.

207 Question. Why did you not go in store at the times you visited there in January?

Answer. The door was locked.

Question. Were you there in February, 1868?
Answer. Yes, sir.
Question. Who were there then?
Answer. I can't say; sometimes one would come to the door, & sometimes another; sometimes Morse, sometimes Sill, & sometimes Seagrass, & sometimes one of the Kent boys.
Question. Could you get in the store in February?
Answer. I don think that I was in the store, but I was in the warehouse.
Question. Were you there during March & April?
Answer. I was.
Question. Was the store open during March & April?
208 Answer. I think it was in the store some time about the first of March, and I think that the store was open again in April.
Question. Did you see Mr. Morse there in March or April?
(Question objected to as leading.)
Answer. I saw Mr. Morse there.
Question. Were there any other parties there?
Answer. There was Mr. Leadbetter, & Mr. Dunphy, & I think I saw Col. May there; also Sills & Seagrass.
Question. Were there any goods sold in April?
Ans. I think that I bought goods there in April.
Question. From whom did you buy them?
Answer. I think once from Leadbetter, and once from Sills.
Question. Were there any other parties selling goods but those
209 you named?
Answer. I think I saw Mr. Morse selling goods once or twice about the last of April.
Question. Was Mr. Morse generally around the store when you came there?
Answer. Sometimes he would be there, & sometimes he would not.
Question. Was Mr. Morse attending to business in the store when you saw him there?
(Question objected.)
Answer. I have seen him writing at the desk, & have seen him behind the counter.
Question. What was Mr. Morse doing there?
Answer. I have seen him behind the counter writing, & have seen him writing in the books.
Question. Were you at Morse's store in 1867?
Answer. Yes, sir.
210 Question. What parties did you usually see there in 1867?
Answer. I have traded with the two Morses, Sills, Seagrass, & R. Merriman.
Question. Did you see Mr. Morse here in January last?
Answer. I did.
Question. Did he ever converse with you on matters of business?
(Objected to.)
Answer. Yes, sir.
Question. State the conversation that you had with him.
(Objected to.)
Answer. The first time he came & asked me for what I was owing him & if I could not let him have wheat or flour. I told him that I would try & buy him some wheat down here below the store about 3 miles, from a man that was owing me. He said that he would just as
211 leave have it as the money. He said that he was to let Mr. Dun-

phy have a thousand sacks of flour, I think that he said, against the first of February, 1868. The next time we had a talk he said that he wanted wheat, flour, or money, as he was settling up his business & wanted to get things straightened, and wanted to get open out again. He stated that he wanted this flour pay Dunphy for a lot of goods that he had bought, to the extent of ten thousand dollars. He said that when he got opened out again he would not hurry me up for money as he had, if I would continue to trade with him.

Question. Did Mr. Morse say where he wanted this wheat & flour delivered?

(Objected to.)

Answer. He said he wanted the flour delivered at the store
212 and the wheat at the mill.

Question. Have you ever done any trading with Mr. Morse since then?

Answer. I sold him a horse the last of Feb'y or the first of March.

Question. Did he pay you for it?

Answer. Yes, sir; Mr. Seagrass paid me.

Question. How did Mr. Seagrass pay you?

Answer. He gave me a ten-dollar greenback & a receipt for wheat I was owing at the store.

Question. Have you ever had any business at the store with Mr. Dunphy?

Answer. I don't think I did.

Question. Did you ever have any business with him out of the store?

(Objected to.)

213 Answer. I come to trade for a cow with him once.

Question. Who did this cow belong to?

Answer. She use to belong to Morse.

Question. Did you buy the cow?

Answer. No, sir.

Question. Who had charge of the cow when you came to buy it?

Answer. I don't know who had charge of her then. Mr. Dunphy said they had paid him over the money, & he had nothing to do with her now.

Question. When did Maj. Morse leave this place?

Answer. I have never seen him here since the time they took his deposition on the Dunphy case.

Question. Did he leave here that day?

Answer. He was packing up a lot of books on the counter, & if
214 he left here that day it must have been late.

Question. When did Mr. Sill leave here?

Answer. I think he left about the same time.

Question. Was there a safe in Morse's store?

Answer. Yes, sir.

Question. Who had charge of the key of the safe?

Answer. The only ones that I see until the time they left was Sills & Morse. I have seen them unlock it, & I saw Mr. Leadbetter pick it up off the desk, remarking that it was a damn pretty place to the key.

Cross-examination.

Question. Who has charge of the Morse store now?

(Objected to.)

215 Answer. As far as I know, the receiver has charge of it.

Question. From the time you purchased goods of Mr. Leadbetter

in April, until the store was taken charge of by the receiver, who had charge of the Morse store?

Answer. Well, sir, I traded with Leadbetter & Mr. Sills, but could not say for certain who had charge of it.

Question. With whom did you transact the business from April until the time you spoke of the receiver taking charge?

(Objected to.)

Answer. I think that just about 2 or 3 before the receiver took it I bought goods from Mr. Leadbetter on credit.

Question. Do you know in what capacity Mr. Leadbetter was acting?

216 Answer. I think he told me he was clerking for Mr. Dunphy.

Question. When did you first receive the impression that Mr. Leadbetter was acting in this capacity?

(Objected to.)

Answer. I think it was the time I bought the goods; some two or 3 weeks before the receiver took charge.

Question. In your direct examination you state that Mr. Morse told you he wanted to pay Mr. Dunphy a thousand sacks of flour. Did he state that this was all he owed him?

Answer. No, sir; he didn't.

Question. To whom was the bill of sale given for the horse you sold?

(Objected to.)

Answer. I could not say for certain whether I read it all or not. I just seen it was a bill of sale for the horse, & I signed.

217 Question. Are you in the habit of signing papers without reading them.

(Objected to.)

Answer. I hardly ever sign a paper without I read some of it to see how it is headed.

Question. Did you get a receipt for the bill of goods purchased; &, if so, by whom was it signed?

(Objected to.)

Answer. I did, & it was signed E. M. Dunphy.

Question. Was this receipt for the bill of goods which were receipted you, in part payment for the horse?

Answer. The receipt was given in part payment for the horse.

Question. When was Morse deposition taken in the Dunphy case?

Answer. I can't say whether it was the last of April or the first of May.

218 Question. In your direct examination you state you sold Mr. Morse a horse. Was this the same given in payment for goods?

Answer. It is.

Question. What do you mean by stating, in a former answer, that Mr. Dunphy said they had paid him over the money, & he had nothing to do with the cow?

Answer. I could not tell who he meant, but I suppose it was the men who had charge of the cows before.

Re-direct examination.

Question. You have stated that the name of E. M. Dunphy was signed to the receipt which you got in part payment for the horse you sold Mr. Morse. Did you know Mr. Dunphy in this transaction prior to receiving the receipt?

Answer. No, sir; I didn't.

219 *Re-cross-examination.*

Question. Do you know to whom you were selling the horse?
Answer. Yes, sir; to Seagrass, the man I was making the trade with.
S. B. WADDLE.

Close of plaintiff's evidence-in-chief.

Defendant Dunphy here filed motion to have all declarations of Morse's, not made in presence of Dunphy, excluded from consideration of jury.

In 3 judicial district court, Lewis & Clark County, Montana Territory.

T. H. KLEINSCHMIDT }
vs.
E. M. DUNPHY ET AL. }

Now comes the defendant Dunphy, and asks the court to ex-
220 clude all the declarations of E. &. B. Morse, introduced in evidence in this case, on the following grounds:
(1.) That the said declarations cannot be evidence against defendant Dunphy.
(2.) That no foundation has been laid for the introduction of the same.
CHADWICK, WORD & SHOBER,
Def'ts' Att'ys.

Motion overruled by court.
Defendant excepted.

E. M. Dunphy, defendant, sworn, testifies as follows:

On the 27th of October, 1867, I sold Morses a bill of goods, payable in flour, by 1st of January, 1868. On Oct. 28th most of goods was delivered. Goods amounted in value to $10,000 dollars in dust,
221 twelve thousand five hundred in currency. Oct'r 29 I heard the wife of Elkanah had obtained a judgment of $15,000 dollars against him. I told him I wanted security on the 30th. I saw him again. He said if I would let him have ten thousand dollars in currency, in addition to what goods he had, they would secure me. I consented to do so. On the 31st October, 1867, I let him have $10,000 in currency, and the goods were estimated at $12,500. The currency was to draw 5 per cent. per month, & the 12,500 for goods 1 per cent. per month. The interest was calculated for one year, and added in the note, secured by mortgage. I think Leadbetter and Small was present in the store when we were talking the matter over, and the money was
222 counted in the store. The money was paid the Morses in Judge Chumasero's office Oct'r 31st, 1867, and the mortgage and note was then & there signed. When the note and mortgage was signed, I paid over the money to Morses. They took the money, & that was the last I saw of it. I never executed any such paper as testified to by Kleinschmidt; I never executed any instrument in relation to the release of said mortgage; I never told Col. George that the Morses only owed me $10,000, to be paid in flour; I never told W'm Herron on the last of October, 1867, that the Morses owed me 1,000 sacks of flour for goods. I am satisfied that Mr. Anders is mistaken in saying the flour contract was made the evening before or the morning the Morses

223 left town. I do mean to say that the flour contract was done away with, and that the Morses really owed me $30,000, payable in one year, on the day they left town, on the 31st of October, 1867. The money I paid E. & B. Morse was all taken from my safe in the store, except about $2,500, which I got from Pinney for gold-dust sold. The $10,000 I paid Morse was in greenbacks. I was at Morse's store several weeks after I took mortgage. I took possession of the store under modification of mortgage Jan'y 3d, A. D. 1868. The exact value of the goods in store was about 5,800 dollars. There were but few groceries in store. I received 153 head cattle in all. I sold them as follows:

34	head, $60	2,040 00
16	" "50	800 00
63	" "72 50	4,567 50
	4 mules' harness	530 00
224	3 wagons	
	8 head beef cattle, $60 p	480 00
11	" " " 45	450 00
	In book accounts about	600 00
	In notes, about 6,300, out of which I realized about	4,000 00

All the flour I received from Morses was about 300 sacks, good, bad, and indifferent, and that the receiver got, and about 700 sacks besides of my own. I got, in all, of the Morses, about $19,000 dollars' worth of property, expenses of disposing about $3,000, leaving $16,000 [dollars,] which should be credited on the note. The principal portion of the flour I received of McDow & Coover. The sheriff of Lewis & Clark took about 600 sacks of the flour I received of them. I
225 never realized any grain or growing crops from the ranch; received no hay, received no colts or horses. The store was opened on the 22nd of March, 1868, and kept open until the receiver took possession. The conversation I had with Herron, in Helena, was on the evening of the 29th of October, 1867, about dark. Col. May introduced me to him, and told me he wanted me to serve on a compromise between Herron & Morses. When I had the conversation with Herron the mortgage was not executed. I had not then loaned the money. After I took possession of the store in January, 1868, Benajah Morse had nothing to do with the store, except as clerk in helping settle book accounts. I paid him $75 00 [dollars] for his services. Seagrass &
226 Sill were hired by me awhile. I paid all these persons for their services. Leadbetter took charge of the store for me about the 19th of March, 1868. I could scarcely, with good management, have realized more than a sufficient amount out of all the goods & property received from the Morses to pay my note secured by mortgage.

I never told Col. George, at Bozeman nor any other place, that the mortgage was only given to secure 1,000 sacks of flour. I ordered removed some of the goods after Jan. 3d, under the advice of counsel. I told Sill to take care of them, & keep them out of the way of execution against the Morses. My att'ys, Chumasero & May, told me that the replevin law was virtually a nullity, & that if I sought to replevy the goods, when levied upon, the other party could give bonds and
227 have them sold.

(Here note, mortgage, & modification of mortgage introduced in evidence.)

"HELENA, *Oct.* 31, 1867.

"$30,000. One year from date we jointly and severally promise to

pay E. M. Dunphy or bearer thirty thousand dollars in treasury notes, for value received, with interest after maturity, at the rate of three per cent. per month until paid.

"ELKANAH MORSE.
"BENAJAH MORSE.

"Witness:
"W'M CHUMASERO.

mortgage

"This note secured by mortgage of even date. ($31 00 revenue stamps cancelled.)

"This indenture, made and entered into this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-seven, between B. Morse and E. Morse, of Gallatin County, Montana
228 Territory, of the first part, and Elijah M. Dunphy, of Edgerton County, in the Territory aforesaid, of the second part, witnesseth that the said parties of the first part, in consideration of the sum of thirty thousand dollars to them in hand paid by said party of the second part, the receipt of which is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto said party of the second part, and to his heirs and assigns, forever, all of the following described real and personal property, to wit: A certain ranch, situated in the Gallatin Valley, in Gallatin County, in said Territory, known as Morse's ranch, and containing six hundred and forty (640) acres, together with the undivided two-thirds part of all the crops now growing and being thereon,
229 and also all crops harvested and gathered therefrom, and the stock belonging on said ranch; also the store and lot situated in said Gallatin Valley, and known as Morse's store, with all goods, wares, and merchandise now therein, and the books, accounts, and evidences of indebtedness due to said first parties from any and all persons whomsoever; also two hundred and twenty-five head of cattle now owned by and in the possession of said first parties in Gallatin County; also ten head of horses and colts and two jacks; also twelve mules, with their harness; also four saddles; also five wagons; also the undivided half of one threshing-machine; also one hundred tons of hay; also three hundred bushels of wheat, now at the Madison Mills, in said Gallatin County; also one reaper and mower, all of said property now being in the
230 possession of said first parties in the said county of Gallatin; also six houses and lots in Summit City, in the county of Madison, in said Territory of Montana, together with all and singular the appurtenances, &c., to said property, or any of the same, belonging and appertaining: To have and to hold the same, with the appurtenances, unto said party of the second part, his heirs and assigns, forever. And said first parties do hereby covenant to and with said second party, that they have title to all of the above-mentioned property, and have good right to sell and convey the same; that it is clear from incumbrance; and that they will warrant and defend the title thereto to said second party, his heirs and assigns, forever: Provided allways, and these presents are upon the express condition, that if said
231 parties of the first part, their heirs or assigns, shall well and truly pay, or cause to be paid, to said party of the second part or his assigns or personal representatives, the just and full sum of thirty thousand dollars in twelve months from the date hereof, according to the condition of a certain promissory note, bearing even date herewith, given by said first parties to said second party, then this instru-

ment to be void; otherwise to remain in full force and effect. But in case of default in the payment of said sum of money, with the interest thereon, or any part thereof, according to the tenor and effect of said note, when the same shall by its terms become due and payable, the said second party, after having advertised such sale for twenty days in a newspaper published in Edgerton County, or by posting notices in four public places in said Gallatin County, may sell the said property, or any part thereof, at public auction to the highest bidder for cash at the place mentioned in such advertisement, and, on making such sale as the attorney of said first parties, for that purpose hereby constituted, irrevocable, or in the name of the second party, shall execute deeds of the property so sold to the purchaser or purchasers thereof, and from the proceeds of such sale shall pay (1) the expenses of advertising, selling, and conveying as aforesaid, including attorney's fees; (2,) the amount then due on said note, principal and interest; and (3) render the overplus, if any, to said first parties, at the office of said second party in Helena. And it is further agreed between the parties that until default be made in the payment aforesaid, it shall and may be lawful for said first parties, and they are hereby authorized, to retain, keep possession of, and carefully use all of the said property above herein described. And it is further agreed that if said first parties shall sell or dispose of said property, or any part thereof, without the consent of said second party, or if at any time prior to the maturity of said note, said second party should be of opinion that the longer retention of said property by said first parties would endanger his security, it shall and may be lawful for said second party, at any time after this date, to take possession of the same, or any part thereof, and hold the same for security for the payment of said note until its maturity as aforesaid.

232 233

"In witness whereof the said first parties have hereunto set their hands and seals the day and year first above written.

234

"BENAJAH MORSE. [SEAL.]
"ELKANAH MORSE. [SEAL.]

"Witness:
"W'M CHUMASERO.

"TERRITORY OF MONTANA, *Gallatin County:*

"On this 5th day of November, 1867, before me, the undersigned, personally came E. Morse & B. Morse, to me personally known to be the persons described in and who executed the foregoing instrument, and acknowledged that they had executed the same for the uses and purposes therein mentioned.

"Given under my and official seal the day & year aforesaid.
[L. S.]
"R. P. VIVION, *Clerk.*
"*Recorder of Gallatin County, M. T.*

"Endorsed as follows:

"B. Morse & E. Morse. To E. M. Dunphy, mortgage. Filed Nov. 5th, 3 o'clock p. m., 1867, at 12 o'clock. M. R. P. Vivion, recorder. Recorded book F, page 152. R. P. Vivion. Filed for record in the county recorder's office, of Madison County, Dec. 20th, 1867, at 9 a. m. Recorded in Book R, page 102. N. J. Davis, co. recorder. D. H. Hopkins, deputy. Offered in evidence M'ch 19, '69, by def'ts. Cha's W. Fowler, clerk.

235

"*Exhibit C.*

"This agreement, made and entered into this third day of January, A. D. 1868, by and between Benajah Morse, surviving partner of the late firm of Morse and Morse, of the county of Gallatin, and Territory of Montana, of the first part, and E. M. Dunphy, of the county of Edgerton, and same Territory, of the second part, witnesseth that the said party of the first part, in order to pay off a certain promissory for
the sum of thirty thousand ($30,000) dollars, dated Helena, Oct.
236 31st, 1867, and payable one year after date to E. M. Dunphy, or
bearer, and executed by Elkanah Morse, late deceased, and by Benajah Morse, the now surviving partner of the late firm of Morse & Morse, composed of said Elkanah Morse and said Benajah Morse, and to secure the payment of which the same parties to the note executed a mortgage of even date therewith upon certain property in said mortgage described, does hereby freely and voluntarily surrender to the said E. M. Dunphy the entire possession and control of all the property in said mortgage described, the said E. M. Dunphy having heretofore, in pursuance of a stipulation in said mortgage, taken possession of a portion of said property; and I hereby authorize the said E. M. Dunphy to
dispose of said property, or any part thereof, for the purpose of
237 satisfying said note and mortgage, having a due regard in such
disposition of said property to my interests, and the interests of my creditors therein, and the interests of the creditors of the late firm of Morse & Morse, and to apply the proceeds of all nett sales thereof (that is, after paying and deducting all necessary expenses in the keeping, securing, collecting, and disposing of said property) to the satisfaction of said mortgage and note until the same shall be fully paid off and satisfied; and the said E. M. Dunphy, party of the second part, covenants and agrees to make such disposition of said property as shall be to the mutual benefit of the parties prior to the time said note and
mortgage become absolutely due and payable, and not to make
238 any sacrifice or forced sale of any of said property, unless the
same shall be made after said note and mortgage becomes due and payable, and then to be made for whatever amount may remain due and unpaid thereon, and only in strict pursuance of the stipulations in said mortgage contained; and the said E. M. Dunphy hereby agrees to allow the said party of the first part two per cent. per month upon all amounts credited upon said note and mortgage, from the respective dates of such credits until the 31st day of October, A. D. 1868, when said note and mortgage become due and payable In order the more fully to designate said note and mortgage, it is agreed and understood that it is the only note and the only mortgage ever executed by the
parties thereto to the said E. M. Dunphy.
239 "Witness our hands and seals the day and year first above
written.

"BENAJAH MORSE. [SEAL.]
"E. M. DUNPHY. [SEAL.]

"Witness:
"GEO. MAY.

"MONTANA TERRITORY, *Gallatin County, ss:*

"I, R. P. Vivion, recorder within and for said county, do hereby certify that the foregoing article of agreement was filed in my office for record on the 4th day of January, A. D. 1868, & was duly recorded in Book F, pages 202 & 203.

"Witness my hand and seal of office, this 24th day of March, A. D. 1868.

[L. S.] "R. P. VIVION, *Recorder*,
"T. R. EDWARDS, *D. R.*

"Endorsed on foregoing as follows:
"B. Morse & E. M. Dunphy, agreement. Filed for record on the 4th day of January, A. D. 1868. R. P. Vivion, recorder. By W'm
240 P. Parsons, dep't recorder. Book F, pages 202 & 203. Offered in evidence by def't, March 19, '69. Cha's W. Fowler, clerk."

The first contract I made with the Morses, in Oct., 1867, was for 1,000 sacks flour. It was in writing, but that was cancelled when I took the mortgage.

James Lemon, being sworn on the part of defendant Dunphy, testifies as follows:

I was in Judge Chumasero's office on the 31st of October, 1867; and while I was in there E. M. Dunphy & the two Morses came in, and Dunphy said, "I have got the money, and you sign the note and mortgage, and I will pay it to you;" they signed the papers, and Dunphy handed them the money. Dunphy said, "Do you not want to count it again;"
241 and Elkana Morse said, "No, I will chance it." It was said to be ten thousand dollars. Chumasero said to Dunphy, "The mortgage must be acknowledged and recorded in Gallatin County." Dunphy asked Chumasero if he could send it by Morse. Chumasero said yes, and he passed the mortgage to Chumasero, and Chumasero gave it to E. Morse. I do not think there was any person in the room at the time except Judge Chumasero, the two Morses, Dunphy, and myself. Dunphy and the Morses went out of the room together, and I don't know whether Morse returned the money to Dunphy or not after they got out of the room. I do not know whether there was $10,000 or not. The money was not counted while in Chumasero's office.

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Certified copy of deposition of B. Morse.

Filed Aug. 14, 1869.

LUCIUS S. PECK, *Clerk.*

243 In the name and by the authority of the Territory of Montana, to L. B. Caswell, notary public, in & for Jefferson County, Wisconsin, greeting:

Whereas it appears to our judge of our district court of the 3rd judicial district of Montana Territory, in and for the county of Lewis & Clark, that Benajah Morse, of the town of Fort Atkinson, in the State of Wisconsin, is a material witness in a certain action now depending in our said district court, between T. H. Kleinschmidt et al., plaintiffs, and E. M. Dunphy et al., defendants, and that the personal attendance of said witness cannot be procured at the trial of said action:

We, in confidence of your prudence and fidelity, have appointed you,

and by the presents do appoint you, a commissioner to examine said witness, and therefore we authorize & empower you, at certain
244 days and places, to be by you for that purpose appointed, diligently to examine said witness on the interrogatories annexed to this commission, and upon the cross-interrogatories also annexed to this commission, on his corporal oath, first taken before you, and cause the said examination of the said witness to be reduced to writing, and signed by the same witness and by yourself, and then return the same unto our district court aforesaid with all convenient speed enclosed under your seal.

Witness Hon. Hiram Knowles, acting judge of said court, and my hand and the seal of said court affixed, this 6th day of January, A. D. 1869.

[L. S.] CHA'S W. FOWLER, *Clerk*,
By CHA'S G. REYNOLDS, *Deputy Clk.*

245 T. H. KLEINSCHMIDT ET AL.
vs.
E. M. DUNPHY, IMPL'D WITH B. MORSE, SURvivor of E. & B. Morse.

Interrogatories to be propounded to Benajah Morse, a witness to be produced, sworn, and examined on the part of the defendant:

Int. 1st. What is your age & present place of abode?

Int. 2. Where were you residing in the year 1867 & 1868, and what business were you engaged, and with whom?

Int. 3. Did you on the 31 day of October, 1867, execute, with your brother, E. Morse, the note and mortgage mentioned in the answer of E. M. Dunphy, filed in this cause? if so, state what was the consideration of said note and mortgage. State all the particulars relative to the indebtedness, if any, of E. & B. Morse to said Dunphy, and why the said mortgage was so given.

Int. 4. At what time, if ever, did you deliver possession of the
246 property, covered by and included in said mortgage, to said Dunphy?

Int. 5. If you should state that said property was delivered to said Dunphy, state whether you ever resumed the possession thereof; and, if so, when; and state fully as to any subsequent connection of yours with said property.

Int. 6. State whether or not you made any collections on account of the old indebtedness of parties to yourself & Elkanah Morse; and, if so, for whom did you make such collections?

Int. 7. Did you, after the delivery of the mortgaged property to Dunphy, make sale of any of the goods; and, if so, under what circumstances, and who was present at any of said times?

Int. 8. State whether any arrangement was made between yourself and Dunphy relative to your assisting him in making collections
247 and attending to any business with which E. & B. Morse had formerly beed connected; and, if so, state what the arrangement was, and the reason for making it, and what you did under it.

Int. 9. State whether or not any paper was executed by Dunphy to E. & B. Morse, or either of you, to the effect that he, Dunphy, would cancel the mortgage whenever E. &. B. Morse, or either of them, wanted him to do so.

Int. 10. State anything else you know material to the issues in this cause.

WM CHUMASERO,
W. F. SANDERS,
& OTHERS,
Att'ys for Dunphy.

In the 3rd judicial district, Lewis & Clark County, Montana Territory.

T. H. KLEINSCHMIDT AND CHA'S E. DUER, pl'ffs,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF E. & B. Morse, and E. M. Dunphy, def'ts.

248 Cross-interrogatories on the part of the plaintiffs.

1st. Did E. & B. Morse, or either of them, owe E. M. Dunphy ($30,000) thirty thousand dollars on the 31st day of October, A. D. 1867, at the time the mortgage was executed?

2nd. Was there not an understanding between E. &. B. Morse and E. M. Dunphy at the time of said was executed, that he was not to receive or collect from you, or either of you, the sum of thirty thousand dollars?

3rd. Was there not an understanding between E. & B. Morse and E. M. Dunphy at the time of and after the execution of said mortgage, that E. & B. Morse should deliver the said Dunphy one thousand sacks of flour in full payment of whatever indebtedness was due him from them?

4th. Was there any agreement between E. & B. Morse and E. M.
249 Dunphy before or after the execution of said mortgage for the delivery to him of one thousand sacks of flour, in payment of what you owed him?

5th. Did you not tell divers persons, after the execution of said mortgage, that you only owed Dunphy one thousand sacks of flour?

6th. Did you not continue to deliver flour to E. M. Dunphy after the execution of the mortgage in payment of your indebtedness to him?

7th. How much flour did you deliver to Dunphy after the 31st day of October, A. D. 1867?

8th. How much money or property did you have when you left Montana?

(Objected to as irrelevant by def'ts' att'ys.—W. C.)

9th. How much money or property have you now, and from whom did you obtain it?

(Objected to as irrelevant by def'ts' att'ys.—W. C.)

250 Deposition of a witness produced, and sworn, and examined on the 5th day of February, A. D. 1869, at Fort Atkinson, Jefferson County, State of Wisconsin, under and by virtue of a commission issued out of the third judicial district court of the Territory of Montana, in a certain cause therein depending and at issue between T. H. Kleinschmidt et al. ag'st E. M. Dunphy, impleader with B. Morse, survivor of E. & B. Morse, as follows:

B. Morse, aged twenty-eight years, of the town of Oakland, Jefferson County, Wisconsin, being duly & publicly sworn, pursuant to the directions hereto annexed, doth depose and say, as follows, viz:

In answer to the first interrogatory the witness says: I am twenty-eight years of age, and now live in the town of Oakland, Wisconsin.

In answer to the 2d interrogatory the witness saith: I resided
250½ in Gallatin County, Montana Territory, & was engaged in merchandising with my brother, Elkanah Morse.

In answer to the 3d interrogatory he saith: Myself and brother Elkanah Morse executed the note and mortgage for thirty thousand dollars about the time mentioned, October 31st, 1867; the consideration was goods amounting to $12,500, with interest at one per cent. per month added for 12 months, and $10,000, currency, loaned at five per cent. per month, for 12 months, making in all $30,000. The note and mortgage were given for the reason that Dunphy had heard that Elkanah Morse' wife had obtained a large judgment against him; and Herron had also a suit against us, and insisted on being secured for the goods; and we consented to it on his making us the additional loan of $10,000. We
received the goods, and the money was paid by Mr. Dunphy to
251 Elkanah Morse in Chumasero's office, Helena, M. T.

To interrogatory 4th the witness says: About the 3rd day of January, 1868, with the understanding that the proceeds were to applied on the payment of the note and mortgage.

To the 5th interrogatory the witness answers: I never resumed possession of the property; I had nothing to do with it, except to occasionally assist in the store when requested to do so by Dunphy, as clerk.

To the 6th interrogatory the witness answers: I did make collections for E. M. Dunphy.

To the 7th interrogatory the witness answers: I may have sold goods on a few occasions, when requested by Sill or Ledbetter; I cannot remember the names of the parties present.

To the 8th interrogatory the witness answers: I agreed with
252 Dunphy to aid him as far as I could to collect old claims and settle up the old indebtedness, for the reason that I was acquainted with the parties, and familiar with the business.

To the 9th interrogatory the witness answers: No such papers were ever executed by Mr. Dunphy.

To the 10th interrogatory the witness answers: I do not know anything further than the fact that the debt was contracted, the goods and money received, and the mortgage executed in accordance with instructions of W'm Chumasero, esqr., and placed on record in the county where we resided.

Cross-examination.

In answer to the 1st cross-interrogatory the witness says: We owed Mr. Dunphy for $12,500 worth of goods, which we agreed to pay 12
months after date of note, and mortgage, with interest at 1 per
253 cent. per month, and $10,000 in cash, to be paid 12 month after date, with interest at five per cent. per month, making in all $30,000.

In answer to the 2nd cross-interrogatory the witness says: There was not.

In answer to the 3rd cross-interrogatory the witness says: There was not.

In answer to the 4th cross-interrogatory the witness says: There was, some time before the execution of the mortgage.

In answer to the 5th cross-interrogatory the witness says: I don't think I did; for had I have done so it would have been untrue. I may

have made such remarks casually to parties who were making inquiries about what I thought did not concern them.

In answer to the 6th cross-interrogatory the witness says: I delivered some flour to Dunphy after the execution of the mortgage.

In answer to the 7th cross-interrogatory the witness says: In
254 the neighborhood of 300 sacks, good, bad, and indifferent.

In answer to the 8th cross-interrogatory the witness says: About enough to take me home respectably.

In answer to the 9th cross-interrogatory the witness says: I have but little; what I have I did not get from Dunphy.

B. MORSE.

Examination taken and reduced to writing, and by the witness subscribed and sworn to this 5th day of February, A. D. 1869, before me.

[L. S.] L. B. CASWELL, *Commissioner.*

Opened and filed March 2nd, 1869.

CHA'S W. FOWLER, *Clerk,*
By CHA'S G. REYNOLDS, *D. C.*

255 Montana Territory, Lewis and Clark County, district court, 3 judicial dist.

I, Cha's W. Fowler, cl'k of said court, do hereby certify that the foregoing is a true & correct copy of the deposition of B. Morse, now on file in my office, in the case of T. H. Kleinschmidt et al. vs. E M. Dunphy et al.

Witness my hand and the seal of said court affixed this 12th August, A. D. 1869.

[SEAL.] CHA'S W. FOWLER, *Clerk,*
By CHA'S G. REYNOLDS, *Deputy Clk.*

256 B. Morse' deposition read on part of defendant:

In answer to the first interrogatory the witness says: I am twenty-eight years of age, and now live in the town of Oakland, Wisconsin.

In answer to the 2nd interrogatory the witness saith: I resided in Gallatin County, Montana Territory, & was engaged in merchandizing with my brother, Elkanah Morse.

In answer to the 3rd interrogatory he saith: Myself and brother, Elkanah Morse, executed the note and mortgage for thirty thousand dollars about the time mentioned, October 31st, 1867. The consideration was goods amounting to $12,500, with interest at one per cent. per month added, for 12 months, and $10,000 currency, loaned at five per cent. per month for 12 months, making in all $30,000. The note
257 and mortgage were given for the reason that Dunphy had heard that Elkanah Morse' wife had obtained a large judgment against him, and Herron had also a suit against us and insisted on being secured for the goods, and we consented to it on his making us the additional loan of $10,000. We received the goods, and the money was paid by Mr. Dunphy to Elkanah Morse in Chumasero's office, Helena, M. T.

To interrogatory 4th the witness says: About the 3d day of January, 1868, with the understanding that the proceeds were to be applied on he payment of the note and mortgage.

To the 5th interrogatory the witness answers: I never resumed possession of the property. I had nothing to do with it except to

258 occasionally assist in the store when requested to do so by Dunphy, as clerk.

To the 6th interrogatory the witness answers: I did not make collections for E. M. Dunphy.

To the 7th interrogatory the witness answers: I may have sold goods on a few occasions when requested by Sill or Ledbetter, the names of the parties present.

To the 8th interrogatory the witness answers: I agreed with Dunphy to aid him, as far as I could, to collect old claims and settle up the old indebtedness, for the reason that I was acquainted with the parties and familiar with the business.

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259 anything farther than the fact that the debt was contracted, the goods and money received, and the mortgage executed in accordance with instructions of W'm Chumasero, esq., and placed for record in the county where we resided.

Cross-examination.

In answer to the 1st cross-interrogatory the witness says: We owed Mr. Dunphy for $12,500 worth of goods, which we agreed to pay 12 months after date of note and mortgage, with interest at 1 per cent. per month, and $10,000 in cash to be paid 12 months after date, with interest at five per cent. per month, making in all $30,000.

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260 There was, some time before the execution of the mortgage.

In answer to the 5th cross-interrogatory the witness says: I don't think I did, for had I have done so it would have been untrue; I may have made such remarks casually to parties who were making inquiries about what I thought did not concern them.

In answer to the 6th cross-interrogatory the witness says: I delivered some flour to Dunphy after the execution of the mortgage.

In answer to the 7th cross-interrogatory the witness says: In the neighborhood of 300 sacks, good, bad, and indifferent.

In answer to the 8th cross-interrogatory the witness says: About enough to take me home respectably.

In answer to the 9th cross-interrogatory the witness says: I have but little; what I have I did not get from Dunphy.

B. MORSE.

261 Mark Leadbetter sworn on part of , testified as follows:

Have known Dunphy since A. D. 1852; was present on the 27th day of October, 1867, when the trade was made between Morse & Morse and Dunphy; the trade was a stock of goods for 1,000 sacks of flour; was present on the 31st day of October, 1867, when the contract was changed. The Morses and Dunphy spoke of a ten-thousand-dollar loan. I went with peach-can of gold-dust to purchase greenbacks; I went to G. M. Pinney's bank; I was only offered $22 dollars per ounce; Dunphy told me he could do better, and he went out himself and sold the dust and

brought back the currency; I saw them counting the money in Dunphy's store; they started out with the money and said they were
262 going to Judge Chumasero's office. I took charge of the store in Gallatin Valley on the 18th day of March, 1868. Sill and Benajah Morse were employed to assist me in settling up the book accounts, as I found it difficult to arrange and settle the accounts myself, & had to get Benajah Morse to assist me; Morse only acted in the capacity of clerk while I was there to assist me in settling the accounts. Morse collected accounts after I came down to Gallatin Co.; on 18th of March attended to that branch of business. Sill & myself had found difficulty in settling the accounts; also sometimes sold goods in the store, and sometimes carried the safe-key when we had occasion to get into the safe. There were three sets of books kept at Morse's store; the Morses kept one set; Dunphy opened another set on the 3d of
263 Jan'y, 1868; and I opened another set on the 18th of March, 1868, when I took charge of store as Dunphy's clerk. The money was counted in the store of Dunphy about noon, Oct. 31st; did not count the money myself, but saw Dunphy & Morse doing it some distance from me. I have been in the employment of Dunphy since 1862; have lived with him in his family most of that time; I am his friend.

Albert Small, sworn on part of plaintiff, testified as follows:

I am brother-in-law of E. M. Dunphy. I loaned Dunphy $500 on the 31st day of October, 1867; I kept the $500 in Dunphy's safe; when I wanted my money again I got it. I was present in December, 1867, at Bozeman. Heard Col. George say to Dunphy, "We will beat you
264 sure." There was about four hundred sacks flour brought from Cover's mill, made from wheat bought by Chestnut and Small.

G. W. Kratzer, sworn on part of defendants, & testified as follows:

I live in the Gallatin Valley. On Saturday, October 26th, 1867, heard Dunphy make a proposition to sell the Morses a stock of goods for 1,000 sacks of flour. I think the evidence in the trial of Hamilton & Herron vs. Morse & Morse was concluded. After Morses had packed up part of the goods and sent a portion of them away, Elk. Morse told me Dunphy had got uneasy and wanted to change the contract. He afterwards, Elk. Morse, told me he had changed the contract; he did not tell me this in the presence of E. M. Dunphy, nor did he say
265 in what particular the contract had been changed. I think the first goods went away on Tuesday. I left with the Morses on the 31st day of October, 1867, in the afternoon; we went as far as Col. Vaughn's ranch that day. Dunphy took possession of the Morse store on the 3d day of January, 1868; I was present; the store was closed about the 20th day of January, 1868; the Packers' sign was taken down Jan'y 3rd, 1868, and Dunphy's sign was placed on the store. After Jan'y 3d, 1868, the business of the store was carried on in the name of E. M. Dunphy. Dunphy then made arrangements with Sill to take charge of the store. I was in the store afterwards and I obeyed Sill and Dunphy's orders. I bought 34 head of cattle of Dunphy; paid him $60 per head; they were cows, & embraced in the mortgage from Mor-
266 ses to Dunphy. I had possession of the store for Dunphy Jan. 4th, 1868. I sold goods for wheat for Dunphy. I carried the key of the safe sometimes; Dunphy left money there to purchase wheat with; it was marked with Dunphy's name. At the time of Hamilton & Herron's trial about the last of October, the Morses had a very light stock of goods. I was present when the flour contract between Morses

& Dunphy was made. The Morses boarded with me, and I was very intimate with them and familiar with their private business. I never knew of any change of the flour contract, or that it was done away with. The Morses did not tell me that it was done away with, and that they had given Dunphy a mortgage for $30,000 00. I went down to the
267 Gallatin Valley in company with the Morses and Andrews after they left Helena, and I did not hear them say anything about the flour contract with Dunphy having been done away with; they talked all the way down about this flour contract with Dunphy, and about getting in the flour to Helena to fill it by the 1st of Jan'y, 1868; this was the time they were to deliver the flour to Dunphy under the contract that I heard. There was no change in the persons that staid in the store of E. & B. Morse after the 3rd of Jan'y, 1868, until Leadbetter came down about the 18th of March. Morse & Sill had run the store before Jan'y 3d, 1868, and they continued to run it after Jan'y, and until Leadbetter came down in March; I sometimes staid in the store myself after Jan'y 3rd, but I had also been in the habit of staying there before Jan'y, 1868.

268 George May's deposition read on part of defendant:

Question. What is your name, age, and place of residence?

Answer. Geo. May; 51 years of age; place of residence, Helena, Montana T'y.

2. Question. Was you present at a conversation between E. M. Dunphy & W'm Herron, in the city of Helena, L. & C. County, M. T., on or about the last of October, A. D. 1867?

Answer. I was.

3. Question. State how you happened to be there, and all that was said during the conversation.

Ans. I had been acting as attorney for Herron & Hamilton in the case of Morse & Morse vs. Herron & Hamilton. The case had been referred out by the court, with the order to the referees to report within five days. The last day for the referees to report was on Monday, the
269 28th day of October, A. D. 1867; the referees reported the case in favor of Herron & Hamilton. After dusk on the evening of the 28th Oct. 1867, after the referees had decided in favor of Herron & Hamilton, Mr. Herron seemed to be anxious to compromise & settle the matter without further trouble, Mr. Dunphy having sold the Morses a stock of goods, and being upon business terms with them. At Mr. Herron's request & partly upon my own suggestion, on the evening of the 29th of October, 1867, about dusk, I introduced Mr. Herron at [the] thier store-room, occupied by Dunphy in Helena, M. T., to Mr. Dunphy, and Mr. Herron & Dunphy had some conversation in reference to the settlement of his & Hamilton's difficulty with the Morses. I was present during the entire conversation & heard no conversation in reference
270 to Mr. Dunphy's matters; but after the conversation had been concluded with reference to the Morse & Morse & Herron & Hamilton matters, Mr. Herron & I left the store together. I was not on that evening under the influence of intoxicating liquors. We all felt in fine spirits on the evening of the 28th, after the report of the referees on our side.

Cross-examination.

1. Question. State whether you were not more or less under the influence of intoxicating liquors for several days prior & subsequent to October 28th, 1867.

(Objected to.)

Answer. During the several days prior to the 28th of October I was using ever day some intoxicating liquors. I think not at any time pending the reference of the case of Morse & Morse vs. Herron & Hamilton, when it required my attention as attorney, that I was so much
271 under the influence of intoxicating liquors as not to be able to do full justice to my client as an attorney; I might have been, after the labors of the day had closed somewhat, more under the influence of intoxicating liquors than I should have been. I do not remember of being under an undue influence of intoxicating liquors during 2 or 3 days after the 28th of October, and am sure that I was not under an undue influence of intoxicating liquors on the evening of the 29th of October, at the time alluded to during said conversation between Herron & Dunphy.

Question. Did you and E. M. Dunphy ever have any difficulty at the Spokane House in this county?

(Objected to.)

Answer. I had a quarrel with Dunphy at the Spokane House,
272 which I do not think would have occurred if we both had not been under an undue influence of intoxicating liquors, and which quarrel grew out of a controversy in reference to the shooting of Ricker by Orn. I do not remember everything that occured in that quarrel. This quarrel occured during the time A. T. Baker kept the Spokane House, and he was present, I think, all the time.

GEORGE MAY.

M. L. Haskins' deposition read on part of defendant:

Question. State your name, age, & place of residence, & occupation.

Answer. M. L. Haskins; am 29 years of age, & place of residence is Jefferson Valley, Gallatin County, and am a farmer by occupation.

273 Question State whether or not, on or about the 29th day of May last, you were acting in an official capacity; &, if so, in what capacity.

Answer. I was, on the 29th day of May, acting in the capacity of assessor for Gallatin County.

Question. Are you acquainted with Col. A. G. P. George?

(Objected to as irrelevant.)

Answer. I am.

Question. State whether, during the last year, you have had any conversation with him in relation to this suit Kleinschmidt et al. vs. Dunphy et al.; &, if so, state what it was.

(Objected to.)

Answer. I have. On the 29th of May I met him at Mr. Culver's, & came in company with him to Morse's store; and when we were returning to Mr. Culver's he asked me if I was a friend to him; I told
274 him that I was for anything that I knew; & he then told me that he wanted me to give in evidence in favor of Kleinschmidt; he said that he would pay me well for my trouble. I told him that I knew nothing in regard to the suit, and therefore could not testify for nor against him. As near as I can remember, the conversation was then dropped until we got to John Culver's; he then told me he wanted to see me aside for a few minutes; we went down into the woods; he then told me that I must give in evidence in favor of Kleinschmidt, & I told him that it was impossible, as I knew nothing. He made the remark that I had been riding over the county, & that I was smart enough to get my own evidence. I

asked him what he took me for, & told him it was impossible—
275 that I would not have anything to do with it. He said that I must, that he would give me $500 00. I gave him to understand that I would not have anything to do with it. He then said that he would give me a thousand dollars, & I still refused. He then told me that money was no object. He said that it was a good thing, & that they must win the suit. He said we get seven thousand dollars for gaining the suit. We then went back to the house. After dinner started for Gallatin City. He then mentioned the case again on the road, & I told him that if I heard of anything that would be of any benefit to the suit that I would let him know; that I did not want any of his money; I had money enough of my own. That part of the conversation took place
276 either on the road or at John Culver's, don't know which. While we were talking in the woods he pulled out his pocket-book & offered to let me have as much money as I wanted at that time, & I told him to put his money up, that I did not want it. That's all the conversation at that time.

Cross-examination.

Question. On your return from Morse's store to Culver's, what time was it when you reached the latter place?

Answer. I was near eleven o'clock in the morning.

Question. Had you been drinking that day before you arrived at Culver's?

Answer. I had taking several drinks.

Question. About how many drinks had you taken before you arrived at Culver's?

277 Answer. I had taken several. That is as near as I can answer.

Question. Did you not take a bottle of whiskey with you from Morse's store?

(Objected to.)

Answer. I did take a bottle for Col. George. I had a pair of cantenas of a large side, and he requested me to carry the bottle.

Question. Had you been drinking on the night of the 28th?

Answer. I took several drinks on the night of the 28th.

Question. On your return to Culver's, on the 29th, were you sober or intoxicated?

Answer. I was not intoxicated.

Question. In your direct examination you have stated as follows: "He then told me he wanted me to give in evidence in favor of Kleinschmidt." Are you positive that he did not say, "get in evidence," instead of "give in?"

278 Answer. I am positive that he said "give in" instead of "get in."

Question. In your direct examination you have stated as follows: "I gave him to understand that I would not have anything to do with it." State the words in which you refused.

Answer. I told him that I knew nothing at all about the case, and could give in no evidence.

Question. When you arrived at Gallatin City, were you perfectly sober?

Answer. I was not intoxicated.

Question. At Campbell's did you sit on a chair at the table, or on the table?

Answer. I sit on the table. I was intoxicated at that time.

Question. Did you or did you not shoot off a pistol that time?
279 Answer. I shot off a pistol that belonged to Col. George. So I have been told.

Question. Are you positive from your conversation that Col. George intended to bribe you to swear falsely, or to bribe you to procure others to swear falsely?

Answer. George said nothing about getting others to swear falsely; but I am positive that he wanted me to swear to things that I knew nothing about.

Question. Did he state anything to you to which he desired you to swear?

Answer. He did.

Question. What was it?

Answer. He asked me if I knew Maj. Morse had gon to the States. I told him that I did not, and he made the remark that he had only taken two thousand dollars with him to the States, & told me to
280 be sure & remember that, & swear to it when I was on the stand. I told him that I knew nothing about it, & the conversation then ended. This was after the conversation at Culver's & Gallatin City, some two or three weeks.

Re-direct examination.

Question. State whether, prior to your conversation with Col. George and you arrival at Gallatin City, you had drank enough to incapacitate you from discharging your official duties?

Answer. I had not.

Question. Did you tend to your official duties, & did you transact any business?

Answer. I did.

Question. What did you do?

Answer. I listed property at a ranch below Culver's, belonging, I think, to Mr. Pearson. I then listed John Culver's property that
281 same day. I then, about 2 p. m., listed W'm Wright's property, known as the Wright & Knox ranch. I then went to Mr. Ren's, 2 miles above Gallatin City, & listed his property about 4 or 5 o'c. p. m., & that is all.

M. L. HASKINS.

J. H. D. Street's deposition for defendant read:

Question. What is your name, age, and place of residence?

Answer. J. H. D. Street; 54 years of age; reside in Gallatin County, on the East Gallatin.

Question. Have you ever had any dealings with the firm of E. & B. Morse?

Answer. Yes, sir; I have had dealings to the amount of about one hundred dollars.

Question. Have you ever had a settlement? and, if so, state when & where the settlement was made.

282 (Objected to.)

Answer. I had. I had paid about half of an account when I came to settle. I asked when & who I should pay the balance to, and he said to pay it to Dunphy, or to him, as Dunphy's clerk. He said Dunphy owned the store, & he was clerking for him. I settled with Mr. Dunphy. It was some time in last January I had this conversation with Morse.

Cross-examination.

Question. You have stated in your direct examination, "I had paid about half of my account when I came to settle." When & to whom did you pay it?

Answer. I paid the first half in two payments; first in the fall of 1866 and the next in the spring of 1867, to best of my recollection.

Question. Have you ever, since the spring of 1867, paid the
283 Morses anything on this account of which you speak?

Answer. No, sir; I think not.

Question. When did you pay the balance of this account to Mr. Dunphy, and how was it paid?

(Objected to.)

Answer. Mr. Dunphy was owing me, & he agreed to credit the balance on his books.

Question. For what was he owing you?

Answer. He was owing me for a law fee.

Question. Have you ever been employed as an attorney in this case?

Answer. Yes, sir.

Question. When & by whom were you employed?

Answer. I was employed by Mr. Dunphy in this case in May,
284 and was retained by him along about January last, some time. I was retained by him generally.

J. H. D. STREET.

George D. Thomas' deposition read on part of defendant:

Question. State your name, age, and place of residence?

Answer. Geo. D. Thomas; age 34 years; reside, Gallatin Valley, Gallatin Co., M. T.

Question. Was you familiar with the stock of goods in the Morse store prior to Nov. 1st, 1867?

(Objected to.)

Answer. I was, as far as the sale-room was concerned.

Question. What was the condition of the store as to the quality of goods in it?

Answer. From about the first of Jan. until about the 1st of October there was a very few goods in it.

285 Question. Was you familiar with the condition of the store after Nov. 1st, 1867, & until the first of January, 1868?

Answer. I think I was up to about the middle of December, 1867.

Question. What was the condition of the store during the time as to the quantity of goods therein?

Answer. From about the latter part of October, or the early part of November, there was a new stock of goods came into the store; about that time they were opening the goods. I happened to be there while they were opening their goods; they filled all the shelves now in the store as full as they would hold. Mr. Hawley showed me the store, & took me into the back-room & showed me a number of boxes which he told me contained goods that had not been opened, as they had no room to put them up.

Cross-examination.

286 Question. Do you know what was in the back-room of which you speak during the time you say the stock in Morse's store was very low?

Answer. Part of the time, of which I spoke of the stock being low, the back-room contained empty boxes and grain; there might have been some few other articles, but I don't think there was any goods to amount to anything.

GEORGE D. THOMAS.

W. D. Jones' deposition read on part of defendant:

Question. What is your name, age, & place of residence?

Answer. W. D. Jones; age 24 years; reside in Gallatin Valley, Gallatin Co., M. T.

Question. State whether or not in January last you was em-
287 ployed by Mr. Seagrass to drive cattle.

Answer. Yes, sir.

Question. State about how many head there were.

Answer. Sixty-three.

Question. From whence were they driven, & where were they driven to?

Answer. They were driven from Ebb. Morse's ranch on the East Gallatin; and they were driven to the 12 Mile House, this side of Virginia City.

Question. State if you know whose cattle they were.

Answer. They said they were Mr. Dunphy's cattle.

Cross-examination.

Question. Who do you mean by they?

Answer. Mr. Seagrass.

Question. Had you ever seen those cattle before that time?

Answer. Yes, sir.

288 Question. How long before that had you known the cattle?

Answer. I never saw them all until about 2 months before they were driven away. I went there then to work, to Ebb. Morse's.

Question. When you first saw these cattle, to whom did they belong?

Answer. I don't know; I never heard them say until I was starting away with the cattle.

W. D. JONES.

Charles Auceney' deposition read on part of defendant:

Question. State your name, age, and place of residence.

Answer. Charles Auceney; Gallatin Co., M. T.; am 42 years old.

Question. Have you ever had any dealings with the firm of E. & B. Morse?

Answer. Yes, sir; I had a good deal of dealing with them.

289 Question. State the time & extent of your dealings.

Answer. From 1864 until last winter.

Question. Have you ever had a settlement with them?

Answer. Yes, sir.

Question. How was the settlement made; and when?

Answer. I settled with Maj. Morse, in the name of Mr. Dunphy, the 21st day of last Feb'y. I then gave my note payable to Mr. Dunphy.

Question. In what capacity was Maj. Morse acting at the time you made the settlement?

Answer. He told me he was acting for Mr. Dunphy.

Question. Did you ever pay the note you speak of?

Answer. Yes, sir.

Question. How?

Answer. Part of it in flour, part of it in wheat, and the balance
290 of it in money.

Question. When was the flour to be delivered; & to whom?

Answer. The flour was delivered in Helena to Mr. Dunphy.

Cross-examination.

Question. When was the wheat delivered; and how much was there?

Answer. It was delivered at the Madison Mills; there was in the neighborhood of two hundred bushels; think about 196 and a fraction bushels.

Question. How much flour did you deliver in Helena; & did you deliver it to Mr. Dunphy personally?

Answer. I delivered 24 sacks; Mr. Dunphy took me to Mr. Leadbetter, and said that man will go with you & unload the flour; that will be all right.

Question. Where was the flour unloaded?

291 Answer. It was unloaded upon the hill behind the court-house, a little above, put into a store-house.

Re-direct examination.

Question. For whom was the wheat delivered at the Madison Mills?

Answer. The wheat was sent down by John Miller. I hired him to take the wheat down for me. I can't tell to whom he delivered it. He took it to the mill, and brought back a piece of paper on which was stated the number of bushels. It was delivered for Mr. Dunphy. Mr. Sill came & told me to take it down.

Question. How did you receive your pay for the wheat you delivered?

Answer. I paid it on the note I was owing, to Mr. Dunphy.

Re-cross-examination.

Question. Was this last note you speak of the same that you
292 gave in settlement for the Morse account?

Answer. Yes, sir; that's the note.

C. AUCENEY.

Philip Thorpe's deposition read on part of defendant:

Question. State your name, age, & place of residence.

Answer. Philip Thorpe; age, 40 years; residence, near Hamilton City, in Gallatin County, M. T.

Question. Was you familiar with the stock of goods in E. & B. Morses' store in Hamilton City, Gallatin County, Montana Territory, prior to the first day of November, 1867? &, if so, state the general condition as to the quantity of goods at that time.

(Objected to.)

Answer. Previous to the Dunphy stock coming in, the stock was broken up, and extremely light.

293 Question. State if you know about what time the new stock of goods arrived at the store.

Answer. In November some time.

Question. What was the condition of the store after that time as to the quantity of stock?

Answer. The store was well filled with a good assortment, consisting of dry goods & a mixed stock.

Question. Did you ever have a conversation with Elk. Morse in regard to the transaction of business with Mr. Dunphy?

(Objected to.)

Answer. I did.

Question. When was it?

Answer. About the middle of November Elk. Morse stated to me that he had bought a stock of goods of Mr. Dunphy; and that Mr. Dunphy had also made him liberal advances for the purpose of being
294 able to purchase grain & produce of the farmers around, for the purpose of extending his trade with them. This occured on a ride between Gallatin City & the store. We were by ourselves at the time.

Cross-examination.

Question. Did Elk. Morse, in his conversation with you, state anything further as to his relations with Dunphy than you have related?

Answer. That was about all in reference to the relations with Dunphy.

PHILIP THORPE.

E. A. Barton's deposition read on part of defendant:

Question. State your name, age, and place of residence.

Answer. E. A. Barton; age, 37 years; reside in Gallatin County, M. T.

295 Question. Was you in Helena about the last of October, A. D. 1867?

Answer. I was.

Question. Did meet E. & B. Morse, or either of them, at that time?

Answer. I met both of them.

Question. State if you know what thier financial condition was about that time.

Answer. I don't know what thier financial condition was at that time.

Question. Did you loan them any money?

Answer. I loaned them $375 00 in currency.

Question. About what time was it?

Answer. Between the 20th and 25th of October, 1867.

Question. About what time did they return from Helena?

Answer. About the last of October or the forepart of November.

296 Question. State if you know what thier financial condition was after they returned from Helena in November, 1867?

Answer. In regard to thier business, I do not anything than that I got my money when they come home.

Question. State if you know in what capacity Benajah Morse was acting at Morse's store about the first of April, A. D. 1868.

(Objected to.)

Answer. He was acting in the capacity of settling up old accounts for Mr. Dunphy, as far as I know.

Cross-examination.

Question. Do you know of your own knowledge that Morse was acting as clerk for Dunphy?

Answer. He told me he was. Mr. Morse told me.

E. A. BARTON.

297 E. M. Dunphy recalled:

Did not get Anders to copy contract on Oct. 31st, 1867. Contract was cancelled before mortgage was given: that is, the flour contract.

Record of report of referees in trial of Morse & Morse vs. Hamilton & Herron introduced, filed Oct. 28th, 1867:

"ELKIN MORSE & B. MORSE, PLAINTIFFS,
vs.
EARL HAMILTON & W'M HERRON, DEFENDANTS.

"We, the undersigned referees, to whom this case was referred, report as follows, to wit: That the evidence shows a full settlement of all thier partnership transactions between plaintiffs & defendants, and that there is no evidence that such settlement was obtained by
298 fraud or misrepresentation.

"October 28, 1867.

"L. M. BURSON.
"W'M F. POWERS.
"M. W. KING.

"Endorsed on the foregoing report as follows:

"Morse & Morse vs. Hamilton & Herron. Report of referees presented & accepted Oct. 28, '67, & ordered filed by the clerk. Munson, judge. Filed Oct. 28, '67. Cha's W. Fowler, clerk.

"The above report being accepted by the court, judgment is hereby entered for defendants.

"MUNSON, *Judge.*"

Record of the entry of judgment in said cause, under date October 31st, 1867, introduced on the trial:

"MORSE & MORSE
vs.
HAMILTON & HERRON.

"And now comes the plaintiffs herein and file thier motion to
299 set aside defendants' bill of costs, and also thier other motion to tax costs, upon which, together with thier motion to set aside the report of referees, the cause was heard. Whereupon the said motions were ordered overruled.

"Ordered that judgment be entered in favor of the def'ts and against the said plaintiffs E. Morse & B. Morse, for the costs of this action, taxed at $1,827 00, and that execution issue therefor."

A. G. P. George recalled on part of plaintiffs, & testified as follows:

Herron was in company with me and Haskins. I told Haskins if he could get any information for us I hoped he would do so, and we would be glad of it. I did not, either directly or indirectly offer to buy Haskins to swear falsely or endeavor to get him to induce others to
300 swear falsely; I only spoke to him that as he was county assesor and travelling over the county, if he should hear any evidence in our favor he would let me know. I was first employed in this case

about the 24th or 28th of December, 1867. At the time I had my first conversation with Dunphy at Bozeman, I was not employed in this case, and knew nothing about it. The suits of Kleinschmidt & Duer vs. E. & B. Morse were commenced after this.

Plaintiffs introduced record which shows that the case of T. H. Kleinschmidt against B. Morse, surviving partner of the late firm of E. & B. Morse, was commenced December 31st, 1867, and the suit of Charles E. Duer against B. Morse, surviving partner, &c., was commenced December 28th, 1867.

301 Frank Buchar sworn on part of plaintiffs:

E. & B. Morse were owing me about $125 00 in the early part of Nov., 1867, when they got back from Helena; I went to their store on the 4th of Nov., 1867, and dunned them for the money. They had got back on the 2nd of Nov. I first dunned Benajah Morse for the money, but failed to get any from him. I then dunned Elkanah Morse; he paid me what gold-dust there was in the store, but lacked $75 00 of paying me. He then borrowed this amount in greenbacks from a gentleman named Miller, then in the store, and handed it to me. This was on the 4th of Nov., 1867.

E. S. Terrell introduced, who testified as follows:

I was deputy sheriff of Gallatin County in November, 1867. About a week after the Morses came from Helena, in Nov., 1867, the
302 execution in the Herron case against the Morses for about $1,800 costs was placed in my hand for collection. I endeavored to collect it, but failed to do so. In Jan'y, 1868, Benajah Morse borrowed money from me.

Mr. Anders also testified as follows:

I was clerking for Mr. Dunphy in October, 1867, in his store in Helena; I saw no money counted there on the 31st of October, 1867, between Dunphy & Morse. My best impression is that the morning the Morses left town the last of October, 1867, that Dunphy gave me the flour contract with E. & B. Morse to copy; it might have been the night before; I mean the contract in which E. & B. Morse agreed to deliver Dunphy 1,000 sacks of flour by Jan'y 1st, 1868, in exchange for the goods;
303 I remember this, because copying that flour contract was the last work I did for Dunphy. I was out considerable during that day.

Here plaintiffs and defendants rested.

Defendant presented to court instructions, and requested court to charge jury as follows:

In district court, 3rd judicial district, county of Lewis & Clark, Territory of Montana.

T. H. KLEINSCHMIDT ET AL.
vs.
E. M. DUNPHY ET AL.

The defendant Dunphy requests the court to instruct the jury as follows, to wit:

1st. Fraud must be clearly proven, and will never be presumed; that the legal presumption is that every man acts honestly and fairly

304 in his dealings with his fellow-men, and performs all his legal obligations.

2nd. The legal presumption of innocence in every case where a party is charged with fraud, is to be regarded by the jury as matter of evidence, to the benefit of which the party charged is entitled; and where fraud is to be proved by circumstantial evidence, the proof ought to be not only consistent with the guilt of the party charged, but inconsistent with any other rational conclusion.

3rd. That when the note and mortgage, executed by E. & B. Morse, were proven, and introduced in evidence, the court and jury are legally bound to receive the same as legal evidence of the due execution of the same for the uses and purposes therein mentioned, and as evidence of a bona-fide indebtedness as named in said note and mortgage;

305 that is, that the amount therein named was actually owing from the Morses to said Dunphy.

4th. When a duly-executed instrument is attacked upon the grounds of fraud, it devolves upon the party attacking it to establish by legal evidence clearly and unquestionably that the same is fraudulent, or the instrument will stand as valid.

5th. Declarations of a vendor or mortgagor will not be received in evidence as against the vendee or mortgagee, unless it be clearly proven that there was a collusion between the vendor or mortgagor, and vendee or mortgagee.

6th. Declarations of a vendor are inadmissable as against his vendee, unless there be collusion; and if the jury find from the whole evidence that no such collusion is clearly established, they will disregard

306 such declarations.

7th. If the jury find that the evidence of fraud and of the collusion between the Morses and Dunphy in the execution of said mortgage introduced by the plaintiffs, has been disproved or evenly balanced by the evidence introduced by defendant, Dunphy, to disprove such collusion, then the jury will disregard the declarations of the Morses concerning the same.

8th. A vendee or mortgagee is not bound by the fraudulent intent of the vendor or mortgagor in making the transfer, unless that it also be proven clearly that there was a fraudulent intent on the part of the vendee or mortgagee in taking such transfer.

9th. Declarations of a vendor or mortgagor concerning the transfer should be received with great caution, that the same are of the

307 nature of hearsay evidence, and are only admitted upon collusion being clearly proven between the seller and purchaser.

10th. In the case of the sale of goods or chattels, the subsequent employment of the vendor by the vendee, in the subordinate capacity of clerk or salesman of the same goods, is not of itself, regardless of all facts and circumstances, conclusive evidence of fraud.

11th. That the vendor cannot remain in the sole possession of the goods sold, but if it is apparent to the world that he has ceased to be owner, and that another has become such, and that the vendor is only subordinate or clerk, the rule requiring an actual and continued change of possession has been complied with.

12th. After the sale of goods & chattels in good faith, and an

308 actual & notorious change of possession, the employment of the vendor by the vendee in the capacity of salesman or clerk is not of itself conclusive evidence of fraud which admits of no explanation.

13th. If the jury find from the evidence that B. Morse was retained in the employment of Dunphy as a clerk aiding and assisting in settling

up the old accounts, owing to his having full knowledge of the same and more competent to settle the same, this would not impair the transfer.

14th. If the plaintiffs rely upon the written agreement claimed by them to have been executed between E. & B. Morse & E. M. Dunphy, testified to by plaintiff Kleinschmidt, then the execution of the instrument by Dunphy must be proven by a preponderance of evidence, and if the jury find that the weight of evidence is against the due execution thereof, then the jury will disregard the same.

309 Court refused instructions. Defendant excepted.

Plaintiffs also presented instructions, which were refused.

Court then charged jury as follows:

KLEINSCHMIDT & DUER
vs.
DUNPHY & BENAJAH MORSE.

When the jury find by a preponderance of testimony the answer to any question, they will so find; it takes only a preponderance of testimony to establish any fact presented to you.

310 Mere words will not constitute a change of possession; change of possession must be evidenced by acts, showing an actual change of possession.

If nine of the jury find from the evidence an answer to any proposition presented to you, you will return it as your finding. The foreman will sign it as that of the jury, and those not agreeing to the finding of the nine had better write their names opposite to that of the foreman as dissenting. The jury are the judges of all the facts and of the credibility of the witnesses in this case.

H. KNOWLES, *Judge.*

To which charge defendant Dunphy then and there excepted in writing, as follows:

KLEINSCHMIDT ET AL.
vs.
DUNPHY ET AL.

The defendant excepts to the decision of the court in refusing
311 the instructions offered by defendant, and its charge to jury.

CHADWICK, SHOBER & WORD,
Def'd'ts' Att'ys.

Jury retired March 24th, 1869, in charge of officer.

On the 25th of March, 1869, the jury in open court returned the following findings of fact of nine of the jury, three jurymen, to wit, Charles Rice, G. W. Tubbs, & J. J. Downhour dissenting.

KLEINSCHMIDT & DUER
vs.
MORSE & DUNPHY.

Propositions to be submitted to the jury.

1st. Did E. & B. Morse retain possession and control and continue to dispose of the property mortgaged after the execution of their mortgage to E. M. Dunphy on the 31st day of October, 1867?

Answer. Yes.

P. WOODS, *Foreman.*

312 2nd. State whether B. Morse, after the 3rd day of January, 1868, continued to remain in possession of the property assigned to Dunphy, and also to exercise control over it, and to sell and dispose of it.

Answer. Yes.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

3rd. If your answer to the last interrogatory be "yea," state how long after the 3rd day of January, A. D. 1868, Benajah Morse remained in such possession and exercised control.

Answer. 19th March.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

4th. Did E. & B. Morse owe E. M. Dunphy thirty thousand dollars ($30,000) at the time of the execution of their mortgage to him on the 31st day of October, A. D. 1867?

Answer. He did not.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

313 5th. If your answer to the last interrogatory be "nay," state what amount E. & B. Morse really did owe E. M. Dunphy, at the time of the execution of their mortgage to him, on the 31st day of October, 1867.

Answer. One thousand sacks flour.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

6th. State whether there was any secret agreement between E. & B. Morse and E. M. Dunphy as to how this indebtedness should be paid; and, if so, what was that agreement?

Answer. There was; one thousand sacks flour.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

7th. State whether the mortgage of E. & B. Morse to E. M. Dunphy was really executed and accepted to secure an actual indebtedness of $30,000 due & to become due, as therein mentioned.

Answer. Nay.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

314 8th. Was there enough property embraced in the mortgage from E. & B. Morse to Dunphy, to have paid the judgments of Kleinschmidt & Duer?

Answer. There was.

P. WOODS, *Foreman.*

9th. Did the mortgage to Dunphy prevent the collection of the judgments of Kleinschmidt & Duer?

Answer. Yes.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

10th. Did E. &. B. Morse own any other property except that embraced in their mortgage to Dunphy?
Answer. We know of none.

P. WOODS, *Foreman.*

11th. Was the note and mortgage, made and executed by E. &. B. Morse to E. M. Dunphy Oct. 31st, 1867, given for a consideration, and to secure a just indebtedness due from said E. & B. Morse to E. M. Dunphy?
Answer. No.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

12th. What actual amount was said note and mortgage given to secure?
315 Answer. One thousand sacks flour.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

13th. Did E. M. Dunphy take possession of the mortgaged property under agreement made and entered into between B. Morse & E. M. Dunphy, January 3rd, 1868, and did said Dunphy take immediate & actual possession of said property thereupon, and was said possession continuous?
Answer. No.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

14th. Did B. Morse exercise any control over the goods and effects mortgaged to E. M. Dunphy after January 3rd, 1868, except as an assistant & clerk of Dunphy?
Answer. Yes.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

15th proposition stricken out.

16th. What was the value of the money & property that came into the actual possession of E. M. Dunphy since Oct. 31st, 1867?
Answer. Over fifty thousand dollars.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

316 17th. Was the mortgage from E. & B. Morse to Dunphy executed & accepted for the purpose of covering up the property of E. &. B. Morse, and delaying or preventing the collection of demands against them or either of them?
Answer. Yes.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

18th. Was the note and mortgage, made and executed by E. Morse and B. Morse to E. M. Dunphy October 31st, 1867, given to secure the payment of 12,500 dollars, actually owing from said E. & B. Morse to E. M. Dunphy for goods & merchandise purchased by said E. & B. Morse of E. M. Dunphy, and for 10,000 dollars in currency actually borrowed

by E. & B. Morse of E. M. Dunphy, and was said $12,500 to draw one per cent. per month interest, & was said 10,000 to draw five per cent. per month interest, and was the interest at such rates for one year added into the note?

317 Answer. No.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

19th. Were there any other persons employed in the store known as "Morse's store," during the entire month of January, 1868, than had been employed there prior to that time?

Answer. No.

P. WOODS, *Foreman.*

20th. Was there a change of po'ssion of the property conveyed to E. M. Dunphy on the 3rd day of January, 1868?

Answer. No change, except the sign.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

21st. If your answer to the last interrogatory be "yea," was such change of possession open and notorious?

Answer. No.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

22nd. If your answer to the last interrogatory be "yea," was such change of possession continuous?

Answer. No.

P. WOODS, *Foreman.*

Chas. Rice, G. W. Tubbs, J. J. Downhour, dissent.

318 Here, on this 25th of March, 1869, defendant Dunphy immediately, upon report of said jury and before findings were entered, filed his objections to entry of findings of said jury.

In district court, 3 judicial district, county of Lewis & Clark, Territory of Montana.

THEO. H. KLEINSCHMIDT ET AL.
vs.
E. M. DUNPHY ET AL.

The above-named defendant, E. M. Dunphy, objects to the recording & entry of the verdict of the jury herein, upon the ground that the said verdict or findings was not of the whole jury, but only of nine—three dissenting thereto.

Dated March 25th, 1869.

SPRATT & WORD,
CHUMASERO & CHADWICK,
SHOBER & LOWRY,
Def'ts' Att'ys.

Amendment allowed immediately after line 23, on page 304, viz: Whereupon the objection to the entry of the findings was overruled, and the said findings were approved by the court; to which ruling the defendant, by his attorneys, then and there excepted.

319 On same day, to wit, March 25th, 1869, defendant Dunphy filed his notice of motion for new trial.

In district court, 3 judicial district, county of Lewis & Clark, Territory of Montana.

T. H. KLEINSCHMIDT ET AL.
vs.
E. M. DUNPHY ET AL.

Take notice that the defendant E. M. Dunphy intends moving this court for a new trial in the above-entitled action, and upon the following grounds, to wit:

1st. That the evidence is insufficient to justify the findings of the jury herein.

2nd. That said findings are against law.

3rd. Of errors in law occuring at the trial & excepted to by the defendant Dunphy.

4th. Newly-discovered evidence material to the issues.

320 5th. That the said findings were not found by the jury, only nine of said jury having agreed to the same, three jurymen dissenting thereto.

That said motion will be made upon affidavits and a statement to be hereafter filed.

Dated March 25th, 1869.

CHADWICK, SHOBER & WORD,
Defendants' Att'ys.

Affidavit of defendant Dunphy.

In 3rd judicial district court, Lewis & Clark County, M. T.

T. H. KLEINSCHMIDT ET AL.
vs.
E. M. DUNPHY ET AL.

E. M. Dunphy, being duly sworn, says that he is one of the 321 defendants in the above entitled cause; that since the trial of said cause he has discovered new and material evidence for him as defendant in said cause in this, that since the trial of said cause he has ascertained where and when and to whom four thousand dollars of the ten thousand dollars loaned by this affiant to E. & B. Morse, October 31st, 1867, and included in the note and mortgage, was paid; that about four thousand dollars of said money was paid to Dr. Lamme, in the Gallatin Valley, in the early part of November, 1867, by E. & B. Morse, for barley; that this affiant made dilligent search and inquiry to ascertain what the said Morses had done with said money, but was unable to ascertain to whom any of said money was paid, or what the said Morses done with said money, or any part thereof, until sub- 322 sequent to said trial; that if a new trial is granted in this case this defendant will be able to prove by said Dr. Lamme where four thousand dollars of the ten thousand loaned by this affiant to said E. & B. Morse, October 31st, 1867, and which was a part of the ten thousand dollars included in the note and mortgage of $30,000 dollars; that this affiant has ascertained since this trial that E. & B. Morse paid large amounts of money to A. Hanauer, in Helena, M. T., subsequent to

the borrowing of the money aforesaid of this affiant, & previous February, 1868; that all of the foregoing information has come to the knowledge of this affiant since the trial of said cause.

E. M. DUNPHY.

Subscribed & sworn to before me this 29th day of March, A. D. 1869.

J. H. SHOBER,
Notary Public M. T.

323 *Affidavit of Ebenezer Morse.*

T. H. KLEINSCHMIDT ET AL.
vs.
E. N. DUNPHY ET AL.

Ebenezer Morse, being duly sworn, says that he is a brother of E. & B. Morse, & that he has in his possession athis house, in Gallatin Valley, a certain agreement made between E. M. Dunphy & E. & B. Morse, & he thinks the document bears date October 29, 1867, and that it was a contract between E. & B. Morse & E. M. Dunphy for the delivery to E. M. Dunphy, by E. & B. Morse, one thousand sacks flour on or before Jan. 1st, 1868; and by certain writing accross the face of said agreement that same was cancelled by & embraced in a certain note and
324 mortgage; that papers of E. & B. Morse were left in hands this affiant, and that this affiant found said paper quite recently, and never informed E. M. Dunphy until March 29th, 1869, & was not aware that said document would have any bearing upon the trial of the above-entitled action.

EBENEZER MORSE.

Subscribed & sworn to before me this 30th day of March, 1869.

J. H. SHOBER,
Notary Public M. T.

Defendants' motion for new trial.

In district court, 3rd judicial district, county of Lewis & Clark, Territory of Montana.

THEO. H. KLEINSCHMIDT ET AL.
vs.
E. M. DUNPHY ET AL.

325 And now comes the above-named defendant, E. M. Dunphy, & moves the above-named court for a new trial herein, upon the statement herein filed, and for errors therein set forth, and to set aside the verdict therein rendered, for the following reasons, to wit:

1st. The court erred in overruling the defendants' objections to the declarations of Benajah Morse, made to & testified to by witness J. E. Burch.

2nd. The court erred in allowing the plaintiff Kleinschmidt to testify to declarations of E. Morse to him, Kleinschmidt, made in the absence of defendant.

3d. The court erred in overruling the general objection, made by agreement between the respective attorneys for plaintiff & defendant,

to all declarations of the Morses concerning the note & mortgage
326 given by the said Morses to said Dunphy, & not made in presence of the said Dunphy.

4th. Court erred in overruling the motion of the defendant Dunphy to strike out & exclude from the consideration of the jury all declarations of the Morses made not in the presence of the defendant Dunphy.

5th. The court erred in refusing to give the instructions of defendant Dunphy to the jury, as requested by defendants' counsel.

6th. The court erred in giving its own instructions as set forth in said statement to the jury.

7th. The findings of the jury are against the law & the evidence.

8th. The court erred in allowing the verdict to be received & recorded against the objections of defendant, as only nine of said jurors agreed thereto, three dissenting to the same.

9th. That no verdict or lawful findings were agreed upon by the
327 twelve jurors before whom said action was tried.

10th. Newly-discovered evidence, material to the issues, & coming to the knowledge of said defendant since the termination of said trial.

11th. The evidence is insufficient to justify the findings of the jury; in this, that the alleged fraud in the execution of the note & mortgage from said Morses to said Dunphy was not fully & clearly proven, and that the same was not proven by a preponderance of the evidence, and that the said findings as to value of property coming into the hands of Dunphy, and of the possession of said property after the 3rd day of January, A. D. 1868, are clearly against the weight of evidence.

WORD & SPRATT,
SHOBER & CHADWICK,
Att'ys for Def't Dunphy.

328 And, on the 30th day of March, A. D. 1869, plaintiffs filed affidavit of A. G. P. George, of which, in words & figures, the following is a copy, to wit:

THEODORE H. KLEINSCHMIDT ET AL., PL'FFS,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, def'ts.

In the district court, 3 judicial district, in & for the county of Lewis & Clark, and Territory of Montana.

A. G. P. George, being duly sworn, says that he is well acquainted with Dr. A. Lamme, the person mentioned in the application of defendants for a new trial herein; that during the trial of this cause at Bozeman City, in the county of Gallatin, and Territory aforesaid, and some time in the month of July, 1868, the said Lamme informed him that
328½ the Morses were indebted to him in the sum of about one thousand dollars for grain furnished them, which was payable some time in December; that said Benajah Morse had informed him that it would be impossible for him to pay said amount until he had received a demand due them from Hugh Kirkendall; that he had got his money just in time, as Dunphy had possession of everything they had immediately afterwards, and that E. & B. Morse had collected their demand of said Kirkendall before such payment was made; that under the advice of plaintiffs' attorneys he had the said Lamme subpœned to attend at

the trial of said cause at said Bozeman City, for the purpose of proving that the said Morses had no money until after they had collected
329 their said demands of said Kirkendall, which was some time during the last of December, 1868, or first of January following; that said Lamme often informed him that the above facts were all he knew about this cause.

A. G. P. GEORGE.

Subscribed and sworn to before me this 30th day of March, 1869.
[L. S.] JAMES E. OWINGS,
Notary Public.

And on the same day, to wit, 30th of March, A. D. 1869, plaintiffs filed the affidavit of W'm Herron, of which, in words & figures, the following is a copy:

THEODORE H. KLEINSCHMIDT ET AL., PL'FF'S,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, et al., def'ts.

In the district court, 3rd judicial district, in and for the county of Lewis & Clark, and Territory of Montana.

330 W'm Herron, being duly sworn, says that he is acquainted with Dr. A. Lamme, the person described in defendants' application for a new trial herein; that, some time in September last, this affiant staid all night with the said Lamme, at his premises in the Gallatin Valley, in the Territory of Montana; that, at the time and place aforesaid, said Lamme informed this affiant that he had been summoned as a witness in the above-entitled cause, on the part of the plaintiffs, and had attended court at Bozeman during the whole of said trial; that he was subpœned as a witness for the purpose of showing that said Morses had purchased grain of him, and that they were unable to pay for the same until they had collected a demand against one Hugh Kirkendall; that said Lamme informed him (this affiant) that said Morse &
331 Morse were indebted to him in the sum of one thousand dollars on account of grain purchased of him; that it was a mere chance that he got his money; that he called upon Benajah Morse to pay the same about the time E. M. Dunphy went to the Gallatin Valley to take possession of the Morses property, and told him, the said Morse, that he knew that he had received the Kirkendall money, & that he must pay him; that said Morse did so pay him some time about the first of January, 1868, or last of December, 1867; that said Lamme informed this affiant that the above facts were all he knew about the case.

WILLIAM HERRON.

Subscribed and sworn to before me this 30th day of March, A. D. 1869.

JAMES E. OWINGS,
Notary Public.

332 And afterwards, on the 31st day of March, A. D. 1869, the affidavits of Alex. M. Woolfolk, E. W. Toole, & Thoroughman & Toole were filed, and of which the following are copies, to wit:

THEODORE H. KLEINSCHMIDT AND CHARLES E. DUER, pl'ffs,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF E. & B. MORSE, and E. M. DUNPHY, def'ts.

TERRITORY OF MONTANA, *County of Lewis & Clarke, ss:*

Alex. M. Woolfolk, being first duly sworn, deposes and says that he was present when the case of Kleinschmidt & Duer vs. Morse & Dunphy was submitted to the jury by the court; that he is positive no exception was taken to the instruction of the court that nine of the jury
333 should return a verdict; that immediately after said cause was submitted to the jury, John H. Shober, one of the attorneys for defendants, proposed to this affiant, who was one of the attorneys for pl'ffs, to enter into a stipulation to the effect that a majority of the jurors in the above cause should return a verdict, which should be valid and binding, but affiant declined making any stipulation that a less number of jurors than required by law should return a verdict.

ALEX. M. WOOLFOLK.

Subscribed & sworn to before me this 31st day of March, A. D. 1869.
[SEAL.] JAMES E. OWINGS,
Notary Public.

E. W. Toole's affidavit.

March term, 1869.

THEODORE H. KLEINSCHMIDT ET AL., PLAINTIFFS,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, et al., defendants.

334 In the district court, 3rd judicial district, in and for the county of Lewis & Clark, and Territory of Montana.

Edwin W. Toole deposes and says that he is an attorney for the plaintiffs in the above entitled cause, and assisted in the trial thereof at the March term of said court; that after the submission of special findings to the jury therein, and said jury had retired to make up their verdict upon instructions of the court, at the request of att'ys for both plaintiffs and defendants, that any nine of said jurymen could find a verdict therein, J. H. Shober, one of the attorneys for the defendant Dunphy, offered to stipulate with the attorneys for plaintiffs that a majority of said jurors, instead of three-fourths thereof, should be authorized and empowered to find a verdict in said cause.

EDWIN W. TOOLE.

335 Subscribed and sworn to before me this 30th day of March, 1869.
[SEAL.] JAMES E. OWINGS,
Notary Public.

Affidavit of Thoroughman & Toole.

THEODORE H. KLEINSCHMIDT ET AL., PL'FFS,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, et al., def'ts.

In the district court, 3rd judicial district, in and for the county of Lewis & Clark, and Territory of Montana.

Thomas Thoroughman and Edwin W. Toole depose and say that they are attorneys for plaintiffs in the above-entitled cause, and assisted in the trial thereof at the March term of said court, and were present in court at the time of the submission of the special findings to the jury in said cause, and the direction of the court given thereupon; that
336 W. F. Chadwick, senior counsel for Elijah M. Dunphy, one of the defendants in this action, together with these affiants and Col. A. M. Woolfolk, attorneys for plaintiffs, united in requesting the court to instruct the jury that any nine of said jurymen could find a verdict, and that no exceptions were taken at [the] thereto.

TH. THOROUGHMAN.
EDWIN W. TOOLE.

Subscribed & sworn to before me this 30th day of March, A. D. 1869.
[L. S.] JAMES E. OWINGS,
Notary Public.

And afterwards, to wit, on the 2d day of April, A. D. 1869, defendants filed affidavits of W. F. Chadwick, J. H. Shober, & R. E. Arick, and of which in words & figures the following are copies, to wit:

337 In district court, 3 judicial district, county of Lewis & Clark, Territory of Montana.

T. H. KLEINSCHMIDT ET AL.
vs.
E. M. DUNPHY ET AL.

W. F. Chadwick, being first duly sworn, deposes & says that he is one of the attorneys of the above-named E. M. Dunphy, in the above-entitled action.

This affiant states that he never united with E. W. Toole, Thos. Thoroughman, or A. M. Woolfolk, in requesting the court to instruct the jury that nine of said jurors could find a verdict, or that this affiant ever in any manner made any request of said court as to its instructions about the number of jurors that could find a verdict.

And said affiant further says that the said court instructed the
338 said jury as to the requisite number to find a verdict upon its own motion.

And affiant further states that immediately after the said court gave said charge and before the jury had retired to deliberate as to their verdict, this affiant requested John H. Shober, one of his associate counsel, to file in writing with the clerk of said court an exception to the whole of the charge of the court, and that the said Shober, in compliance with such request of this affiant, did then & there file such objections.

W. F. CHADWICK.

Subscribed & sworn before me this 31st day of March, A. D. 1869.
CHAS. W. FOWLER, *Clerk.*

Affidavit of J. H. Shober.

In 3rd judicial district court, Lewis & Clark County, Montana Territory.

339 T. H. KLEINSCHMIDT & DUER
vs.
E. M. DUNPHY ET AL.

J. H. Shober, being duly sworn, deposes and says that he was one of the attorneys for defendant Dunphy on the trial of the above-entitled cause, and assisted as such on the trial of the same at the March term, 1869, of the district court aforesaid.

This deponant further states that immediately upon the charge to the jury by his hon. Hiram Knowles, associate justice presiding at said trial, W. F. Chadwick, senior counsel for defendant Dunphy, stated to the court that the defendant Dunphy excepted to the whole of the judge's charge to the jury, and thereupon requested me, as associate counsel, to file exceptions to the whole charge of the judge to the
340 jury in writing, which I immediately then and there did, as will appear by the files of said court.

This deponent further states that the conversation alluded to in the affidavits of Col. Woolfolk and E. W. Toole, with this deponent, was after the jury had been charged by the court, and after defendant Dunphy had filed his exceptions to the charge of the judge to the jury in writing, and while this deponent and said Woolfolk & Toole was en route home from the court-house, and was mere badinage.

JOHN H. SHOBER.

Subscribed & sworn to before me this 2nd day of April, A. D. 1869.
CHAS. W. FOWLER, *Clerk.*

Affidavit of R. E. Arick.

THEODORE H. KLEINSCHMIDT ET AL., PL'FFS,
vs.
341 BENAJAH MORSE, SURVIVING PARTNER of the late firm of E. & B. Morse, et al., def'ts.

In the district court, 3rd judicial district, in and for the county of Lewis & Clark, and Territory of Montana.

R. E. Arick, being duly sworn, deposes and says that he is one of the att'ys for defendant Dunphy in the above-entitled cause, and assisted as counsel at the trial thereof at the March term of said court, 1869; that immediately after the court gave its charge to the jury, and before the jury had retired to deliberate upon their verdict, W. F. Chadwick, esqr., senior counsel for defendant Dunphy, within the hearing of this affiant, requested John H. Shober, one of his associate counsel, to file in writing with the clerk of said court an exception to the decision
342 of the court in refusing the instructions offered by defendant and its charge to the jury; and that the said Shober did then and there

reduce such objections to writing and file the same with the clerk in the presence of this affiant.

R. E. ARICK.

Subscribed & sworn to before me this 31st day of March, 1869.
CHA'S W. FOWLER, *Clerk.*

And afterwards, to wit, on the 6th day of April, A. D. 1869, plaintiffs filed with the clerk of said court the affidavits of John H. Curtis, George Secord, & A. E. Mayhew, of which in words & figures the following are copies, to wit:

THEODORE H. KLEINSCHMIDT ET AL.
vs.
BENAJAH MORSE AND E. M. DUNPHY.

343 In the district court, 3rd judicial district, Lewis & Clark County, Montana Territory.

COUNTY OF LEWIS & CLARK, *Territory of Montana, ss:*

John H. Curtis, being first duly sworn, deposes and says that he was one of the jury, who tried the above cause; that when the court charged the jury, and the special findings were submitted to them, affiant is positive that the attorneys for defendants as well as the plaintiffs united in requesting the court to instruct the jury that any nine of them could find a verdict in said cause.

J. H. CURTIS.

Subscribed & sworn to before me this 6th day of April, A. D. 1869.
[L. S.] JAMES E. OWINGS,
Notary Public.

344 *Affidavit of George Secord.*

THEODORE H. KLEINSCHMIDT ET AL., PL'FFS,
vs.
BENAJAH MORSE ET AL., DEF'TS.

In the district court in and for the third judicial district of the Territory of Montana, County of Lewis & Clark, ss:

George Secord, being duly sworn, says that he was one of the jury in the above-entitled cause; that when court charged the jury in said case, W. F. Chadwick, esqr., att'y for defendants, was standing by his honor Judge Knowles, and had just been conversing with him, when his hon. the judge, turning to the jury, but looking at Mr. Chadwick, said that he had just been requested to instruct the jury that any nine of the jury might find a verdict, upon which Mr. Chadwick, waiving
345 his hand, bowed assent to the remark of his honor the judge.

GEORGE SECORD.

Subscribed & sworn to before me this 3rd day of April, A. D. 1869.
[L. S.] JAMES E. OWINGS,
Notary Public.

Affidavit of A. E. Mayhew.

COUNTY OF LEWIS & CLARK, *Territory of Montana, ss:*

THEODORE H. KLEINSCHMIDT ET AL., PL'FFS,
vs.
BENAJAH MORSE ET AL., DEF'TS.

In the district court, 3rd judicial district, in and for the county of Lewis & Clark, and Territory of Montana.

Alex. E. Mayhew deposes and says that he is an attorney at law & United States attorney for the Territory of Montana; that he was
346 present in court on the evening of the 24th of March, 1869, at Helena City, in the county and Territory aforesaid, at the time the special findings were submitted to the jury by the court in the above-entitled cause; that the attorneys, both for plaintiffs and defendants, united in requesting the court to instruct the jury that any nine of them could find a verdict in said cause; this affiant further says that he remembers distinctly that W. F. Chadwick, att'y for defendant Dunphy, united in said request; that there was no objections stated thereto by attorneys on either side of said cause.

A. E. MAYHEW.

Subscribed & sworn to before me this 3rd day of April, A. D. 1869.
[L. S.] JAMES E. OWINGS,
Notary Public.

347 Hiram Knowles, judge, Territory of Montana, county of Lewis & Clark, ss:

I, Hiram Knowles, acting judge of the district court of the third judicial district, in and for said county of Lewis & Clark, and Territory of Montana, do hereby certify that the foregoing statement, together with all amendments, is true and correct as settled before me.

Dated Helena, M. T., this 26th day of April, A. D. 1869.

HIRAM KNOWLES, *Judge.*

348 (Paging continued from bound book.)

Pursuant to the terms of a certain stipulation hereinafter set forth, the proceedings had in this cause subsequent to those embodied in the engrossed statement upon motion for new trial are herein put in transcript form, which, together with the said engrossed statement, constitute, as per said stipulation, the transcript on appeal in this cause, and are as follows:

And afterwards, to wit, on the 2nd day of April, A. D. 1869, the court signs a decree in this cause, which is in the words and figures following, to wit:

THEODORE H. KLEINSCHMIDT AND CHARLES E. DUER, pl'ffs,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, and E. M. Dunphy, def'ts.

349 In the territorial district court, 3rd judicial district, Lewis & Clark County, Montana Territory.

Whereas on the 12th day of March, A. D. 1868, Theodore H. Kleinschmidt recovered a judgment in this court against Benajah Morse, the above-named defendant, for the sum of sixteen thousand eight hundred and eighty dollars:

And whereas on the said 12th day of March, A. D. 1868, Charles E. Duer also recovered a judgment in this court against the said Benajah Morse for the sum of fifteen thousand four hundred & ten $\frac{05}{100}$ dollars, both of said judgments being recovered against the said Benajah Morse as surviving partner of the late firm of E. & B. Morse:

And whereas executions issued upon said judgments were returned wholly unsatisfied, the entire property of E &. B. Morse being
350 covered by a mortgage executed by them to E. M. Dunphy, for thirty thousand dollars, on the 31st day of October, A. D. 1867:

And whereas on the 30th day of April, A. D. 1868, this creditors' bill was commenced by T. H. Kleinschmidt, on behalf of himself and all other creditors who chose to become parties to the action, for the purpose of setting aside the said mortgage to E. D. Dunphy as fraudulent and void, and to subject the mortgaged property to the payment of his said judgment, and asking also judgment against the said E. M. Dunphy, and that an execution thereon might issue against him for any residue remaining unsatisfied after the proceeds of said mortgaged property had been applied to the payment of the said judgment:

And whereas Cha's E. Duer afterwards became a party to this said action.

And whereas said cause coming on for trial on the 15th day
351 of March, A. D. 1868, the jury found that there was no open, notorious, or continued change of possession of the property mortgaged to E. M. Dunphy, after the 3rd day of January, A. D. 1868, the time when said mortgage was modified so as to transfer the immediate possession of said mortgaged property to E. M. Dunphy:

And whereas, moreover, the jury found that at the time said mortgage was executed E. & B. Morse really owed E. M. Dunphy only one thousand sacks of flour, and not thirty thousand dollars, as claimed in said mortgage:

And whereas, moreover, they further found that said mortgage was executed by E. & B. Morse and accepted by Dunphy for the purpose of covering up the property of E. & B. Morse, and delaying and preventing the collection of demands against the said E. & B. Morse:

And whereas they further found that the said Dunphy had re-
352 duced to actual possession & converted over fifty thousand dollars of the property embraced in the said fraudulent mortgage:

And whereas, moreover, it appears that all the property embraced in said mortgage has been disposed of, except what is in the possession of the receiver in the above cause:

And whereas, moreover, the jury found that the said fraudulent mortgage defeated the collection of the judgments of the aforesaid plaintiffs:

It is therefore ordered, adjudged, and decreed that the said mortgage from E. & B. Morse to E. M. Dunphy for thirty thousand dollars be set aside as fraudulent, void, and of no effect; and that the said plaintiffs recover of the said E. M. Dunphy the sum of thirty-five thousand seven hundred and thirty-seven $\frac{50}{100}$ dollars, the amount of plaintiffs'
353 judgments, interest, and costs, together with the costs of this action, taxed at seven thousand one hundred & forty-nine $\frac{79}{100}$;

that the said judgments be credited by the money in the possession of the receiver in the above cause, and that plaintiffs have execution against the said Dunphy for the residue of said judgment after such credit has been entered.

Given under my hand this 2nd day of April, A. D. 1869.

HIRAM KNOWLES, *Judge.*

And afterwards, to wit, on the 6th day of April, A. D. 1869, plaintiffs, by their attorneys, filed affidavits of George Secord, A. E. Mayhew, & J. H. Curtis: (See pages 330, 331, & 332, in this book.)

And afterwards, on the 27th day of April, A. D. 1869, the
354 following order was made, & is in the words & figures, to wit:

KLEENSCHMIDT & DUER
vs.
MORSE & DUNPHY.

The argument of this cause upon defendants' motion for a new trial having been resumed and being concluded, it is thereupon ordered by the court that the said motion for new trial be overruled and denied.

To which ruling the defendant Dunphy, by his attorneys, then and there excepted.

And afterwards, to wit, on the 29th day of April, A. D. 1869, defend-
ant, by his attorneys, filed with the cl'k of said court his notice of
355 appeal, of which, in words & figures, the following is a copy, to wit:

In 3rd judicial district court, Lewis & Clark County, Montana Territory.

T. H. KLEINSCHMIDT & CHAS. E. DUER, PL'FFS,
vs.
BENAJAH MORSE & E. M. DUNPHY, DEF'TS.

You will please take notice that the defendant, E. M. Dunphy, in the above-entitled action hereby appeals to the supreme court of the Territory of Montana from the judgment and decree therein made and entered in the said district court April 2nd, 1869, in favor of the plaintiffs and against this defendant in said action, and from the whole thereof, and from the order of the said district court made April 27th, 1869, refusing
a new trial herein and overruling defendant's motion for new
356 trial herein, on statement of facts and errors of law assigned in defendant's statement on motion for new trial assigned and settled by the judge of said court, and which statement and the errors therein assigned is made a part of, and attached to, this notice.

Dated Helena, April 29th, 1869.

CHADWICK, SHOBER, SPRATT, & WORD,
Att'ys for Defendant and Appelant.

To clerk of district court aforesaid & Mess. Woolfolk &
Toole & Davis, & Thoroughman, att'ys for pl't'ffs and respondents.

We hereby accept service of copy of notice of appeal herein, and waive service of copy of statement of facts and errors assigned in taking
said appeal, and agree that said statement and errors assigned
357 and settled by the judge of said court on motion for new trial shall constitute the statement and errors assigned on the appeal

herein, as well as the errors assigned in court overruling defendant's motion for new trial.

We hereby accept service of a copy of notice of appeal herein this 29th day of April, 1869.

WOOLFOLK & TOOLE,
Att'ys for Pl'ffs.

And afterwards, to wit, on the 29th day of April, A. D. 1869, defendant filed with the clerk of said court his undertaking on appeal, which is in the words and figures following, to wit:

In 3rd judicial district court, Lewis & Clark County, Montana Territory.

358 T. H. KLIENSCHMIDT & CHA'S E. DUER, pl'ffs,
vs.
BENAJAH MORSE & E. M. DUNPHY, DEF'TS.

Whereas E. M. Dunphy, one of the above-named defendants, has appealed to the supreme court of the Territory of Montana from an order of the district court aforesaid overruling, on the 27th day of April, 1869, a motion for a new trial in said cause, and also from a judgment and decree entered in said cause in favor of said plaintiff, and against this defendant, April 2d, 1869, by said court for the sum of thirty-five thousand seven hundred and thirty-seven $\frac{50}{100}$ damages, and seven thousand one hundred & forty-nine $\frac{79}{100}$ dollars costs of suit, and from the whole and every part of said judgment & decree and order refusing a new trial:

359 Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Joseph S. Wilson, David Small, Henry Monroe, John Potter, and David A. Bently, citizens of the Territory of Montana, do hereby jointly and severally undertake and promise, on the part of appellant, E. M. Dunphy, that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars, for which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant is desirous of staying the execution of the said judgment and decree so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge further jointly and severally bound in the further sum of eighty-six thousand dollars, that if the

360 said judgment appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs that shall be awarded against the appellant on appeal.

Given under our hands this 29th day of April, A. D. 1869.

JOSEPH S. WILSON. [SEAL.]
HENRY MONROE. [SEAL.]
DAVID SMALL. [SEAL.]
DAVID A. BENTLY. [SEAL.]
JOHN POTTER. [SEAL.]

In presence of—
R. E. ARICK.

TERRITORY OF MONTANA, *County of Lewis & Clark, ss:*

Joseph S. Wilson, being first duly sworn, deposes and says that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

JOSEPH S. WILSON.

361 Subscribed & sworn to before me this 29th day of April, 1869.

R. E. ARICK,
Notary Public.

TERRITORY OF MONTANA, *County of Lewis & Clarke, ss:*

Daniel Small, being duly sworn, deposes and says that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

DANIEL SMALL.

Sworn to & subscribed before me this 29th day of April, 1869.

R. E. ARICK,
Notary Public.

TERRITORY OF MONTANA, *County of Lewis & Clark, ss:*

John Potter, being duly sworn, deposes and says that he is worth the sum of nine (9) thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

JOHN POTTER.

Sworn to & subscribed before me this 29th day of April, 1869.

R. E. ARICK,
Notary Public.

362 TERRITORY OF MONTANA, *County of Lewis & Clark, ss:*

David A. Bentley, being duly sworn, deposes and says that he is worth the sum of fifty thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

DAVID A. BENTLY.

Sworn to & subscribed before me this 29th day of April, 1869.

R. E. ARICK,
Notary Public.

TERRITORY OF MONTANA, *County of Lewis & Clark, ss:*

Henry Monroe, being duly sworn, deposes and says that he is worth the sum of seven thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

HENRY MONROE.

Sworn to & subscribed before me this 29th day of April, 1869.

R. E. ARICK,
Notary Public.

Endorsed on the foregoing undertaking is the following, to wit:

Approved & filed April twenty-ninth, A. D. 1869.

CHA'S W. FOWLER, *Clerk.*

363 And afterwards, on the 3d day of May, A. D. 1869, appellant,

by his attorneys, filed with the clerk of said court his assignment of errors on appeal, of which, in words and figures, the following is a copy, to wit:

In 3rd judicial district court, Lewis and Clark County, Montana Territory.

T. H. KLEINSCHMIDT, CHA'S E. DUER, PL'FFS,
vs.
BENAJAH MORSE AND E. M. DUNPHY, DEFENDANTS.

Now comes defendant, E. M. Dunphy, and assigns the following errors on appeal herein:

1. The court erred in admitting improper testimony to go to the jury under the objection of defendant, and excepted to by defendant, as appears of record in statement settled on motion for new
364 trial herein.

2nd. The court erred in refusing to give to the jury instructions Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, & 14, (as appears of record in statement on motion for new trial,) offered by defendant Dunphy.

3. The court erred in this, that it charged the jury that "it takes only a preponderence of testimony to establish any fact presented to you."

4. The court erred in this, that it charged the jury: "If nine of the jury find from the evidence an answer to any proposition presented to you, you will return it as your findings. The foreman will sign it as that of the jury; and those not agreeing to the findings of the nine had better write their names opposite to that of the foreman as disenting."

5. The court erred in overruling defendant Dunphy's objection
365 to the recording and entry of the verdict of the jury, as appears of record in statement on motion for new trial.

6th. The court erred in recording the findings of nine of the jurors empanneled in said cause as the verdict of the jury.

7. The court erred in rendering any judgment or decree against this defendant upon the said findings of nine of said jury.

8. The court erred in rendering the judgment and decree which was rendered on the said findings of nine of said jury.

9. The court erred in not rendering judgment in favor of this defendant and against the plaintiffs.

10. The court erred in overruling defendant's motion for new trial.

CHADWICK, SHOBER, SPRATT, & WORD,
& W. F. SANDERS, *Att'ys for Appellant.*

366 Service of copy of above accepted this 3rd day of May, A. D. 1869, reserving all right of objection to the said assignment of errors.

WOOLFOLK & TOOLE,
Att'ys for Pl'ffs.

And afterwards, to wit, on the 28th day of July, A. D. 1869, the parties to this action, by thier respective attorneys, filed their stipulation, of which, in words and figures, the following is a copy, to wit:

Territory of Montana, county of Lewis & Clark, district court 3rd judicial district.

KLEINSCHMIDT & DUER
vs.
E. M. DUNPHY ET AL.

It is hereby stipulated, by and between the attorneys for the respective parties pl'ff & def't in the above-entitled action, that the
367 statement engrossed by the clerk, and used upon the argument upon the motion for a new trial of this cause, (the same being in bound book form,) shall be taken from the files, and shall, together with a transcript of subsequent proceedings had, be considered as a transcript on appeal to be used in the supreme court; and the said attorneys hereby waive all objection to the informality of such transcript.

CHUMASERO & CHADWICK,
Att'ys for Def't Dunphy.

The undersigned attorneys consent to the above, reserving thier right to correct all mistakes and errors in said transcript copy.

WOOLFOLK & TOOLE,
Att'ys for Pl'ffs.

Clerk's accrued costs since the rendition of judgment, $29 10.

368 Territory of Montana, county of Lewis & Clark, district court 3rd judicial district.

I, Cha's W. Fowler, clerk of the district court of the third judicial district of Montana Territory, in and for the county of Lewis and Clark, do hereby certify that the forgoing three hundred and fifty-four pages, numbered from one to three hundred and fifty-four, inclusive, contain a true, full, & correct transcript on appeal of the case of Kleinschmidt & Duer against Morse & Dunphy.

Witness my hand and the seal of said court affixed this 4th day of August, A. D. 1869.

[SEAL.] CHA'S W. FOWLER, *Clerk*,
By CHA'S G. REYNOLDS, *Deputy Clerk.*

369 In the supreme court, Montana Territory.

And afterwards, to wit, on the said 9th day of August, A. D. 1869, T. H. Kleinschmidt and Charles E. Duer, plaintiffs and respondents, appear in open court by their attorneys, Messrs. Woolfolk, Toole and Throughman, and file their petition, with the affidavit of Alex. M. Woolfolk, in the words and figures following, to wit:

T. H. KLEINSCHMIDT & CHARLES E. DUER, plaintiffs and respondents,
vs.
E. M. DUNPHY & BENAJAH MORSE, surviving partner of E. & B. Morse, defendants and appellants.
} In supreme court.

To the honorable supreme court of Montana Territory:

The above respondents (plaintiffs in the court [court] below) re-

370 spectfully petition the honorable supreme court for leave to correct the statements on appeal filed in the above cause.

Your petitioners would respectfully represent that the exception to the introduction of the evidence of T. H. Kleinschmidt, as appears on pages 133 & 134 of the statement on file, was not saved at the time of the trial of the above cause; that no such exception was noted in the minutes of the judge or of the clerk, as required by law, and no such exception was presented for the signature of the judge during the trial of the cause; that said exception was presented to Judge Knowles, and signed by him, (as appears by the statement,) on the 7th of April, 1869, being several weeks after the trial of the above cause; and that said exception was then improperly allowed.

371 Your petitioners respectfully petition the honorable court for leave to prove the above facts, and that the said exception be expunged from said statement on file.

T. H. KLEINSCHMIDT &
CHARLES E. DUER, *Respondents.*
Per THO'S THOROUGHMAN,
WOOLFOLK & TOOLE, *their Att'ys.*

Alex. M. Woolfolk, being first duly sworn, states that he is one of the attorneys for the above petitioners, and familiar with the facts stated in said petition; that said petitioners are absent from Madison County, and unable, in consequence thereof, to verify this petition; that affiant has good reasons to believe, and does believe, the facts stated in the above petition to be true.

ALEX. M. WOOLFOLK.

372 Subscribed & sworn to before me this 9th day of August, 1869.
L. S. PECK, *Clerk.*

Filed Aug. 9, '69.

L. S. PECK, *Clerk.*

And afterwards, to wit, on the 9th day of August aforesaid, Elijah M. Dunphy, defendant and appellant, appeared in open court, by Messrs. Sanders, Chadwick, Chumasero, Shober, Word, & Spratt, his attorneys, and filed motion in the words & figures following, to wit:

The supreme court, Territory of Montana, August term, 1869.

T. H. KLEINSCHMIDT ET AL. *vs.* ELIJAH M. DUNPHY ET AL. } Motion.

And now comes Elijah M. Dunphy, appellant and defendant in
373 the above-entitled cause, and moves the court here to dismiss the petition of the plaintiffs in the above-entitled cause, filed herein August 9th, 1869, to be allowed to alter and mutilate the statement and record of the court below, for the following reasons:

1st. Because it does not appear by said petition that the record filed is imperfect.

2nd. That this court has not jurisdiction to settle the record in the court below, but only to determine what is the record in the court below, as it was there settled.

3rd. That it is not permissible for this court to strike out alleged er-

rors certified to this court in due form of law, and shown by the record in the court below, but only to try such alleged errors.

4th. That it appears that the record certified to this court con-
374 tains the statement that this defendant did except to the admission of the evidence mentioned in the said petition, and such record, as to the parties thereto, imports absolute verity, and may not be contradicted in this court.

Wherefore this defendant prays judgment of this honorable court that he shall not be required to sustain, by oral or other evidence, the correctness of the records of the court below.

W. F. SANDERS,
With whom is Chadwick, Chumasero, Shober, & Word & Spratt, Att'ys for Def't Dunphy.

Filed Aug. 9, '69.

L. S. PECK, *Clerk.*

And thereupon the consideration of said motion was continued until 2 o'clock p. m. of same day.

And afterwards, to wit, on the said 9th day of August, A. D.
375 1869, the defendant and appellant, Elijah M. Dunphy, by his attorneys aforesaid, filed in open court the affidavit of J. H. Shober, Sam. Word, and W. F. Chadwick, in the words and figures following, to wit:

The Territory of Montana supreme court, August term, A. D. 1869.

T. H. KLEINSCHMIDT AND CHARLES E. DUER, pl't'ffs,
vs.
BENAJAH MORSE, SURVIVING PARTNER, &C., and Elijah M. Dunphy, def'ts.

MADISON COUNTY, *ss:*

John H. Shober, Samuel Word, and W. F. Chadwick, being first severally sworn according to law, each for himself, on his corporal
376 oath, doth depose and say:

I was present, and attorney for defendant Dunphy, appellant, on the trial of the above case in the district court of the 3rd judicial district, sitting in and for Lewis and Clark County therein, when the court overruled said defendant's objections to the introduction of parol proof as to the contents of the paper writing mentioned in the exceptions on pp. 133-'4 of the record on file in said supreme court, mentioned in pl't'ffs petition; that thereupon then, openly, and as a part of said trial, W. F. Chadwick, esquire, one of these affiants, as such attorney, excepted to the said ruling of the court recited in the exception, as therein stated on said pages. And further deponents say not.

377 J. H. SHOBER.
SAM. WORD.
W. F. CHADWICK.

Sworn to and subscribed before me by the said Samuel Word, John H. Shober, and W. F. Chadwick, this 9th day of Aug't, 1869.

L. S. PECK,
Clerk Supreme Court.

Filed Aug. 9th, '69.

L. S. PECK, *Clerk*,
Per A. M. S. CARPENTER.

And thereupon, on the said 9th day of August, A. D. 1869, the aforesaid plaintiffs and appellees, by their attorneys, filed in open court the affidavit of Thomas Thoroughman and A. M. Woolfolk, in the words and figures following, to wit:

T. H. KLEINSCHMIDT & CHARLES E. DUER, pl'ffs,
378 *vs.*
E. M. DUNPHY AND BENAJAH MORSE, surviving partner of E. & B. Morse, def'ts.
} In the supreme court.

COUNTY OF MADISON, *Montana Territory*, *ss:*

Thos. Thoroughman and Alex. M. Woolfolk, being first duly sworn, depose and say that they were attorneys for the plaintiffs, Kleinschmidt and Duer, in the court below; that they are positive that no such exception as appears on 138 & 134 of statement was taken at the time of the trial of the cause in the court below. Affiants further state that, when witness Kleinschmidt was placed upon the stand, and interrogated as to the contents of a certain instrument showed to him by Elka-
379 nah Morse, signed by E. M. Dunphy, wherein Dunphy agreed to cancel a certain mortgage executed to him by E. & B. Morse whenever the Morses desired him to do so, the defendants' attorneys objected to parol evidence of the contents of such instrument signed by Dunphy, on the ground that no notice had been given to produce the instrument referred to by the witness.

The plaintiffs' attorneys, Thoroughman & Woolfolk, stated to the court that such notice to produce the instrument had been served, both upon Dunphy and the attorneys of Benajah Morse, before Morse's appearance had been withdrawn; that such notice had been produced in the former trial in Gallatin County, and that the court had
380 then allowed parol evidence of the contents of the instrument to be proved. Affiants further stated to the court that such notice had been filed with the papers, and could not be found. The defendants' attorneys, Shober and Chadwick, then stated to the court that they were not attorneys in the former trial in Gallatin County, and had never seen such notice to produce the original instrument, and that Mr. Word, who was present at the former trial, had no reccolliction of such a notice having been produced. His honor Judge Knowles then required that the plaintiffs' attorneys should satisfy the court by affidavits that such notice to produce the original instrument had
381 been served upon defendants before the court would allow witness to testify as to its contents.

Thomas Thoroughman & A. M. Woolfolk, the above-named affiants, then started to write affidavits to the effect that such notice had been served, and, while they were writing the same, W. F. Chadwick, one of the attorneys for defendants, found the original notice among the papers on file in the case, and called attention to it.

As soon as this notice was found these affiants at once abandoned writing their affidavits, and the witness, Kleenschmidt, was allowed to proceed, without objection, to testify as to the contents of the instrument showed to him by Morse. Affiants further state that they

382 verily believe that no exception was taken by defendant's counsel to the introduction of this evidence of Kleinschmidt as soon as the notice was found to produce the instrument; that the only question had been whether such notice had been really given to produce the original instrument.

Affiants further state, by agreement between the attorneys & court, it had been understood that all evidence of the declarations of Morse to bind Dunphy should be considered excepted to without a formal exception being taken, and that such agreement was incorporated into the statement on file, but that there was no such agreement as to exceptions to any other evidence than that of Morse's declarations.

THO'S THOROUGHMAN.
A. M. WOOLFOLK.

383 Subscribed & sworn to before me Aug. 9, '69.

L. S. PECK, *Clerk.*

Filed Aug. 9, '69.

L. S. PECK, *Clerk.*

And afterwards, to wit, on the said 9th day of August, A. D. 1869, the attorneys of the said plaintiffs and appellees filed in open court the certificate of Cha's W. Fowler, in the words and figures following, to wit:

In district court, 3rd judicial district, Territory of Montana, county of Lewis & Clarke.

KLEINSCHMIDT & DUER
vs.
E. M. DUNPHY.

384 I, Cha's W. Fowler, clerk of said court, do hereby certify that no exception was noted, either in the journal of the proceedings of the said court, kept by the clerk, or the docket of the judge to the introduction of the evidence of T. H. Kleinschmidt, as to the contents of a certain instrument showed him by Elk. Morse, signed by E. M. Dunphy, whereby said Dunphy agreed to cancel a certain mortgage executed to him by E. & B. Morse, whenever desired by the Morses so to do.

Done at the request of pl'ffs' att'ys.

Witness my hand and the seal of said court, affixed this 6th day of August, A. D. 1869.

[L. S.] CHAS. W. FOWLER, *Clerk.*

Filed Aug. 9, '69.

L. S. PECK, *Clerk*,
Per A. M. S. C.

385 And afterwards, to wit, on the said 9th day of August, A. D. 1869, the attorneys for T. H. Kleinschmidt and Charles E. Duer, plaintiffs and appellees aforesaid, filed in open court the affidavit of E. W. Toole in the words and figures following, to wit:

KLEINSCHMIDT ET AL., PLAINTIFFS,
vs.
DUNPHY ET AL., DEFENDANTS.

TERRITORY OF MONTANA, *County of Lewis & Clarke, ss:*

E. W. Toole makes oath and says that he was present and par-

ticipated in the trial in the above-entitled cause, as one of the attorneys on the part of the plaintiffs therein; that a certain exception allowed by the court to the introduction of oral evidence as to the contents
386 of an instrument of writing, as appears on pages 133 & 134, in the transcript in said cause, upon making up the statement therein, this affiant has reason to believe and does believe, was not made or saved upon the trial; that it was conceded in making up said statement that said exception was not entered in the judge's minutes, and that when the same was settled, upon making up the statement herein, Col. A. M. Woolfolk and this affiant requested and desired his honor, Judge Knowles, to insert the fact that said exception did not appear in his minutes in said statement; that this affiant verily believed that the court erred in signing and settling the same, upon making up
387 said statement, without the same being entered in the minutes as aforesaid, and was desirous of said fact appearing upon the record, that the sense of the Supreme Court might be had thereon.

And further this affiant says not.

E. W. TOOLE.

Subscribed and sworn to before me this 7th day of August, A. D. 1869.

[SEAL.] MASSENA BULLARD,
Notary Public, M. T.

Filed Aug. 9, '69.

L. S. PECK, *Clerk*,
Per A. M. S. C.

And thereupon the court upon resuming the consideration of the motion aforesaid, to strike out exceptions on pp. 133 & '4 of statement filed herein, overruled the same.

388 And thereupon and then the said plaintiffs' attorneys excepted to the said ruling of the court.

And afterwards, to wit, on the 10th day of August, A. D. 1869, W. F. Sanders, Word & Spratt & Shober, and Chumasero & Chadwick, the attorneys for the said defendant and appellant, filed in open court their brief, in the words and figures following, to wit:

In supreme court, Territory of Montana, August term, A. D. 1869.

T. H. KLEINSCHMIDT ET AL.
vs.
E. M. DUNPHY ET AL.
} Points and authorities of appellant.

1st. There was error in the court allowing the witness Kleinschmidt to testify as to the contents of a certain writing, claimed
389 by appellee to have been executed by the def't Dunphy to E. & B. Morse, the execution of which was denied by Dunphy under oath.

1st Greenleaf, sec. 88.
1st Phillip's Ev., C. & H. notes, page 475.
2nd " " page 422.
Practice act, sec. 422.

2nd. There was error in admitting the declarations of the Morses, concerning the conveyance to Dunphy made to divers persons, while

they, the Morses, were not [not] the possession of the property conveyed, and not made in the presence of Dunphy.

3rd. That the court erred in allowing the verdict of the jury to be received & recorded against the objection of the appellant, as only
390 nine of the jurors agreed thereto, three dissenting to the same, no verdict or lawful findings being agreed upon by the twelve jurors before whom the same was tried. See—

5th & 7th sec's of Con. of U. S.
6th section of organic act, M. T.
Story's Ev., 1st vol., sec. 60, 72, 76.
3rd Bl'k Com., pages 431 & '2.
1st A. K. Marshall's Rep't, p. 346.
Whitaker's N. Y. Pr., 391.
2nd Leading B'r Cases, p. 327.
2nd Ker., (12th N. Y.,) p. 198.
Sedgewick on Statutory & Constitutional Cen., p's 545 & '6.
10th Bacon Abridgm't, page 306 & 315.
9th " " " 564.
Bow. Law Dic., 2nd vol., page 622.
Bonell " " " " " 113 & 584.
3rd Greenleaf Ev., page 354, sec. 260 & notes, and 264 and notes under same.
1st Blak. Reports, page 374.
391 2nd vol., Story on Constitutional Law, sec. 1763.
2nd Cal., page 94.

W. F. SANDERS,
WORD & SPRATT & SHOBER,
CHUMASERO & CHADWICK,
Att'ys for Appellant.

Filed Aug. 10, '69.

L. S. PECK, *Clerk.*

And afterwards, to wit, on the said 10th day of August, A. D. 1869, Mess. Thomas Thoroughman, and Woolfolk & Toole, the attorneys for the said plaintiffs and appellees, filed in open court thier brief, in the words and figures following, to wit:

In supreme court, Territory of Montana.—August term, 1869.

T. H. KLEINSCHMIDT ET AL., RESPONDENTS,
vs.
E. M. DUNPHY ET AL., APPELLANTS.
} Respondents' brief.

392 1st. There was no error in the court in allowing witness Kleinschmidt to testify as to the contents of a certain writing executed by Dunphy to E. & B. Morse, after notice to produce the original had been served upon both Dunphy and the att'ys of E. & B. Morse, and after B. Morse, the surviving partner of E. & B. Morse, had been interrogated concerning its execution.

The record shows that every means known to the law had been exhausted to obtain the original instrument, and parol evidence of its contents was consequently proper.

2nd Hill, (N. Y.,) p. 205.
1st Greenleaf Ev., from sec. 82 to sec. 91.
Montana Statutes, sec. 380, 421–'2.
8th Cal., p. 49.

393 2nd. The court never admitted evidence of the declarations of the Morses against Dunphy, until evidence had been introduced showing collusion between them to defraud creditors, and until proof had been made that the Morses remained in possession of the property mortgaged to Dunphy, and exercised ownership and control over it after the period when they claimed to have delivered the possession thereof to Dunphy. The question as to when a foundation had been laid for the admission of such evidence was one of discretion for the chancellor below, and the verdict of the jury on the question of collusion and possession of the Morses shows that the discretion was properly exercised.

2nd Phillips Evidence, (Part 1st,) p. 177–'8. Also p. 602.
394 7th Cal., p. 392; 8th Cal., p. 113, 128, 213.
10th " p. 456.
6th Seldon, (N. Y.,) p. 309.
6th B. Monroe, (Key.,) p. 428.
20th U. S. Dig., p. 383, sec. 528, 532–'3.
21st " " " 231, " 281–'2–'3.
22nd " " " 246, " 317, 319.
23rd " " " 231, " 238, 257, 265.

3rd. The verdict of nine jurors upon the issues submitted was a lawful verdict under the laws of Montana Territory.
(Late) Montana Statutes, p. 66, sec. 15.

4th. The defendants took no valid exception to the charge of the court directing that nine jurors should return a verdict; an exception to be entertained by the supreme court should point out the spe-
395 cific portions of the charge excepted to.

Exceptions made to the whole charge of the court, without pointing out any specific part of it excepted to, will not be regarded by the supreme court if any portion of the charge is correct.
Montana Statutes, p. 170, sec. 188–'9.
25th Cal., p. 146, (under the above statute.)
28th Cal., p. 174.
2nd Selden, (N. Y.,) p. 234.
3rd " p. 266.
1st Kernon, (N. Y.,) p. 417.
2nd Denio, (N. Y.,) p. 218–'19.
4 Selden, p. 37.
5th Peters, U. S., p. 284.
2nd Kernon, p. 313.
1st Cowan, (N. Y.,) p. 622.

5th. All the authorities are clear that a jury trial may be waived.
396 If the defendants had any objection to a verdict of nine jurors, they should have saved it by exceptions to the charge of the court directing that nine jurors should return a verdict.

The affidavits annexed to statement show that it is at least questionable whether they designed to save an exception to that portion of the charge. They had no right to gamble for a verdict, and then object to receiving the verdict after it had been given.
3rd Peters, U. S. Supreme Court Rep., p. 467–'8.
17th U. S. Dig., p. 365–'99, referring to 1st Wis., p. 401.

6th. The 6th & 7th amendments to the Constitution of the United

States relative to trial by jury apply only to the federal courts
397 under the Constitution, and do not affect State or territorial courts.

Organic act of Montana, sec. 6 & 13.
Sec. 10, article 1st, of Constitution.
2nd vol., Story on the Constitution, pages 575–'6–'7–'8–'9; notes.
10th Wendell, (N. Y.,) p. 449.
2nd Cowan, " p. 815 & 819.
8th Wendell, p. 102.
3rd Cowan, N. Y., p. 701.
7th Peters, U. S. Supreme Court Rep., p. 465, (opinion by Ch'f Justice Marshall.)
Federalist, No. 83.
18th U. S. Dig., p. 148, sec. 339, (9th Ind., p. 559.)
13th " " p. 127, " 66, (17th Ala., p. 510.)
1st " " " 522, " 183, (12th Conn., p. 243.)

7th. Territorial courts are in no sense federal courts under the Constitution.

Article III, sec. 1 and sec. 2, of the Constitution of U. S.
398 Organic act of Montana, sec. 9.
2nd Story on Constitution, p. 228, sec. 1325.
1st Peters, (U. S.,) Supreme Court, p. 690, (side-page 546.)

8th. This action is a bill in equity, (creditors' bill,) and equity cases are not embraced in the provisions of the Constitution relative to trial by jury. It is expressly limited to "suits at common law," where the amount in controversy exceeds twenty dollars.

2nd Story on the Constitution, p. 577–'8; also p. 580, 582–'3.
3rd Peters, U. S. Supreme Court, p. 478–'9, p. 485.
5th Cal., p. 294, 192, 112.
3rd Howard, Prac. Rep's, p. 139.
24th Wendell, p. 337.
4th Smith, (N. Y.,) p. 199, 210, 211.
19th U. S. Dig., p. 246, sec. 399.
399 17th U. S. Dig., p. 220, sec. 333–'4–'5–'6–'7.
15th " " p. 111, " 64.
21st " " p. 207, " 284.
22nd " " p. 221, " 270.
23rd " " p. 115, " 120; also p. 211, sec. 281, 279–'80; also p. 485.

THOS. THOROUGHMAN,
WOOLFOLK & TOOLE,
Att'ys for Respondent.

Filed Aug. 10, '69.

L. S. PECK, *Clerk.*

And afterwards, to wit, on the 11th day of August, A. D. 1869, this cause coming on for hearing, it was ordered by the court that the clerk of the 3rd judicial district court within said Territory of Montana transmit to this court certified copies of the interrogatories and
400 cross-interrogatories in the deposition of Benajah Morse, filed in this case in the office of said clerk.

And afterwards, to wit, on the said 11th day of August, A. D. 1869,

the attorneys for the said defendant and appellant filed in open court thier additional brief, in the words and figures following, to wit:

Trial by jury:
2nd Bl'k Com., Morg., pa. 379–'81.
Chitty's Note, Bl'k Com., Morg., pa. 377.
Decision S. C. of U. S., 2 & 3 Peter, Morg., pa. 446.
Bacon's Abr'dgm't, 5th vol., pa. 308.

As to power of legislature to change No. of jurors:
Bacon's Abr'dgm't, vol. 9, pa. 564, & references.
N. Y. Reports, 2 Kernon, pa. 198.
Sedgwick, Constitutional Law, 542 et sequitor.
1st Blackford's Rep., pa. 374.
401 2 Story on Con., sec. 1762 et sequitor,
16 Cal., 253.

Verdict unanimous:
Bacon's Abr'dgm'nt, vol. 10, pa. 306–315,
Bouvier's Law Dic., title Verdict; also Burrill's Law Dic., i'dem.
2 Leading Crim. Cases, pa. 327, and notes thereto.

Waiver:
Voorhies's Code, pa. 484 & ref.

Right of trial by jury cannot be waived by implication:
2 Cal. 94, 245.
5 Cal., 112.

1st Marshall's Ky. Rep., pa. 213, it is decided that in all cases where a party had a right of trial by jury at the adoption of the Constitution that instrument secures it to him, and no legislative act can deprive him of it.

402 KLEINSCHMIDT
vs.
DUNPHY ET AL.

Trial by jury:
Amendments to U. S. Constitution, 5th & 7th articles.

1st. The Constitution of the U. S. the supreme law of the Territory. All courts are formed by it.

2nd. As to power of legislature, see organic act, sec. 6, Montana Statutes, pa. 24.

3rd. Is the act of the legislature requiring ⅔rds of the jury to find the verdict constitutional?
See sec. 5 & 7 of amendment to U. S. Con., page 18.
See sec. 6, organic act of Territory, " 24.

Is this a chancery case?
See 1st Story's Equity, sections 60, 72, 76.

See 3rd Blackstone's Commentaries, page 431–432.
403 See 1 A. K. Marshall, page 349.

KLEINSCHMIDT
vs.
DUNPHY ET AL.

Is the law requiring ⅔ of the jury to find a verdict constitutional?
1st Greenleaf, sec. 88.
Practice act, " 422.

1st. Does the 5 & 7 sections of the Constitution apply to this Territory and to the courts of the same?
See sec. 5 & 7, Constitution of the U. S., page 18.
" " 6, organic act, " 24.

2nd. Is this a chancery case?
1st Story's Equity, sections 60, 72, 76.
3rd Blackstone's Commentaries, page 431–432.
1 A. K. Marshall's, " 349.
Whitaker's Law Practice, " 391.

Is the act of the legislature constitutional?
404 2nd Leading Criminal Cases, 327.
12th N. Y. R., 2nd Kernon, N. Y. Rep'ts, 198.
Sedgwick on Statutes, &c., pages 545–'6.
10th Bacon's Abr'dgm't, " 306–315.
9th " " " 564.
2nd Bouvier Law Dic., 2nd vol., page 622.
2nd Burrill's " " " 113.
" " " " " 584.
3rd Greenleaf on Evidence, " 264.

KLEINSCHMIDT
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What is the proper construction of the 6th & 13th sections of the organic act?
The whole act must be construed together.
See Sedgwick on Statutes, pages 237, 238.
See organic act, 6th & 13th sections.

Is a Territory a State, and what is its status?
405 See 1st Kent, page 424.
" 2nd Crandle, " 445.
" 1st " " 312.

What is a jury?
Sedgwick on Statutes, page 545 & 546.
Leading Cases, " 327, 331, 333.
9th vol. Bacon's Abridgm't, " 564.
Verdict, 10th " " " 306.
" 2nd Bowvier's Dictionary, " 622.

2nd Burrill's " " 584.
12th New York, " 198.
1st A. A. Marshall, " 349.
3rd Greenleaf, sec. 262–264.

Power of legislature to change jury.

Filed Aug. 11, 1869.

L. S. PECK, *Clerk*,
Per A. M. S. C.

And afterwards, to wit, on the 13th day of August, A. D. 1869,
406 this case came up for argument by counsel for the respective parties, at the conclusion of which the case was submitted to the court.

And afterwards, to wit, on the 14th day of August, A. D. 1869, a certified copy of the deposition of B. Morse was filed in open court, which said deposition is in the words and figures following, to wit:
(See certified copy of said deposition inserted between pages 241 & 242 of this statement or transcript.)

And afterwards, to wit, on the 17th day of August, A. D. 1869, Mess. Thomas Thoroughman and Woolfolk & Toole, attorneys for T. H. Kleinschmidt, plaintiff and respondent, filed in open court their additional breif in the words and figures following, to wit:

407 T. H. KLEINSCHMIDT ET AL., PL'FFS,
vs.
E. M. DUNPHY ET AL., DEF'TS.

Additional points and authorities of appellees on the question of the refusal of instructions.

1. The defendants' attorneys took no valid exception to the overruling of their instructions by the court. Thier exception was not signed by the judge, (statement, p. 296,) but was simply filed with the clerk, and signed by defendants' attorneys. It does not in any manner comply with the statute, and is worthless as an exception.

See specially on above point, 20th Cal. Rep., p. 174; also 15th Cal., p. 183; 2nd vol. Cal. Dig., (Parker,) p. 27, 373–'5; also authorities
408 cited in brief.

2. But waiving objection that no proper exception was taken, and waving also the fact that defendants were not entitled to instructions, involving absolute propositions of law on special questions of fact submitted to a jury, the appellees' counsel propose to establish one of the two following propositions with regard to all of said instructions: either,

1st. Said instructions were properly refused as being incorrect; or,

2nd. That their refusal, as shown by the findings, could not have possibly injured the appellant.

The question of the remaining in possession by the Morses after the 3rd day of January, 1868, (the day on which, by the terms of thier instrument with Dunphy, they were to deliver the possession,) was
409 submitted in every possible way to the jury, and every phase in which the question was submitted met with but one response, viz., that there was no change of possession.

They answer to 2nd interrogatory was, (statement, p. 298,) that B.

Morse, survivor, remained in possession of, exercised control over, and sold & disposed of the property mortgaged to Dunphy after the 3rd day of Jan'y, and until the 19th of March, '68, (3d int.)

To the 14th interrogatory (statement, p. 301) they answer that he did not exercise such control as an assistant and clerk of Dunphy.

To the 13th interrogatory they answer that Dunphy did not take possession of the mortgaged property on the 3rd day of January.

410 To the 19th interrogatory they answer that the same persons and no other were employed in Morse's store during the entire month of January as had been employed there before.

To the 20th, 21st, & 22nd interrogatories they answer there was no change of possession but the sign; that it was not an open or notorious change, or a continuous one.

Thus in every possible shape the question of change of possession was submitted, and all answered by the jury in one way, that Morse remained in possession and control, and disposed of the mortgaged property as owner and not as clerk of Dunphy. Under the Montana statutes of fraud this made the conveyance absolutely fraudulent. Under the

411 general law of frauds the mildest expression that can be found is, that remaining in such possession of mortgaged property (chattels) is presumptive evidence of fraud, and it devolves upon the mortgagee to rebut such presumption.

Under the Montana statutes (page [p.] 494, sec. 11) the above findings of the jury, that Morse continued to dispose of the mortgaged property as owner, and not as clerk, of Dunphy, the conveyance was clearly in trust for the use of the person making the same, and consequently void.

With these preliminary observations, take the instructions offered.

The first instruction states the abstract proposition that fraud must be clearly proven and will never be presumed.

412 This was an abstract proposition and not proper as an instruction, when only special issues were submitted.

1st Cal. Dig., (Parker,) p. 474, sec. 17.

2nd Cal., p. 39, 389.

9th Cal., p. 353.

Besides, the question of fraud was not submitted, but only various issues on the answers to which the chancellor could act.

1st Cal. Dig., p. 473, sec. 9.

6th Cal., p. 119.

The court in his instructions tells the jury that each fact must be proven by a preponderance of evidence, and this, taken with the instruction that they might give such credibility to witnesses as they saw proper, presented the case fairly to the jury. Even if the question of

413 fraud had been submitted to the jury, it can be proved like any other fact by a preponderance of legal evidence, and it only requires such preponderance to establish it.

In fact, a preponderance of legal evidence in all cases carries conviction to the human mind, and only in criminal cases is the accused entitled to the benefit of a reasonable doubt.

The court having already given an instruction upon a given point, it is not error to refuse an instruction upon the same point.

1st Cal. Dig., p. 475, sec. 29, 34, 33.

32nd Cal., p. 280.

8th Cal., p. 87.

But no possible injury could have resulted to the appellant from the refusal of the instruction, even if the court erroneously refused it.

414 After the jury found that Morse remained in possession and

exercised ownership and control after Jan'y 3d, '69, the presumptions of law against fraud were all changed. If not conclusive evidence of fraud under the statute, such possession was certainly presumptive evidence. The pl'ffs were entitled to the benefit of an instruction, which they did not get, informing the jury that if they found (as they did) that there had been no change of possession, then the mortgage was presumed to be fraudulent.

In fact, in view of the findings of the jury as to change of possession, the instruction that fraud "will never be presumed" was erro-
415 neous, because it is allways presumed in such cases. The refusal of the instructions then could have done the defendants no possible injury, as is evident, when taken in connection with the findings on the question of possession.

Had the possession of the Morses been admitted, the instruction would have been improper, as it was found by the jury it was equally irrelevant.

The error of the court in refusing an instruction will be disregarded when no injury resulted from such refusal.

34th Cal. Rep., p. 641.

1st Cal. Dig., p. 475, sec. 43.

2nd Hill, (N. Y.,) p. 205.

The respondent is clearly the only party who suffered from the court's refusal to instruct the jury on the question of fraud. Had proper
416 instructions been given with regard to the legal presumptions of fraud from mortgagor's remaining in possession, there is no question that respondent would have been benefited by it in view of the findings of the jury.

But the court failed to tell them that fraud will be presumed in any case. Hence it was unnecessary to tell them that it would never be presumed.

The record does not show even that the court instructed the jury that Morse's fraud in making the mortgage was confessed by the withdrawal of his appearance.

This was certainly an important instruction for pl'ff, because if Morse was really fraudulent in making the mortgage to secure
417 $30,000 to Dunphy, Dunphy must have been fraudulent in accepting it.

A fraudulent vendor may sell to an innocent vendee, ignorant of the fraud, but the rule is different as to creditors.

If a man really owes an honest debt, it is no fraud to prefer it by a mortgage, nor is it fraud to accept a preference. If the debt is not honest, it is fraud to prefer it, and fraud to accept the preference.

The confession of Morse's fraud by withdrawal is really a confession of Dunphy's fraud.

The 2nd instruction was clearly erroneous, and was properly refused.

The court correctly refuses an erroneous instruction alltogether.
418 1st Cal. Dig., p. 474, sec. 23; p. 475, sec. 37.
25th Cal., p. 460.

13th Cal., p. 58.

The 3rd instruction, that the note and mortgage should be received as "legal evidence" of a bona-fide indebtedness, &c., was only calculated to mislead the jury and contained no proposition of law.

The court had already permitted the note and mortgage to go to the jury as "legal evidence" of what they purported to be, and this was all the instruction asked.

The 4th instruction was substantially embraced in the first. It was

clearly an erroneous instruction to tell the jury that a party attacking an instrument on the ground of fraud must establish such
419 fraud clearly and unquestionably.

To prove a fact unquestionably is to prove it beyond a reasonable doubt, and this the plaintiffs were not compelled to do.

Were the facts making up the fraud of Morse & Dunphy to be proved by a preponderence of evidence, (with due regard for credibility,) or to be proved unquestionably?

Was it necessary to prove unquestionably that Morse owed Dunphy only 1,000 sacks of flour, but that Dunphy received in money & property over $50,000, or to prove "unquestionably" that there was no change of possession of the mortgaged property?

Yet all these findings make up fraud.

420 However the court may regard this instruction, its refusal could do no injury to appellant when considered in connection with findings on the question of possession.

The 5th instruction was clearly improper. The chancellor had decided himself, as was his province, that sufficient evidence of collusion had been established to admit the declarations of the Morses. It was not proper to refer the question to the jury after he had properly decided it himself.

It is not error in a court to refuse to give to the jury an instruction which embraces a question which came properly before the court and not before the jury.

1st Cal. Dig., p. 475, sec. 36.

9th Cal., p. 353.

421 But as to both the 5th and 6th instructions they could not possibly have benefitted the defendants, as the jury found the fact of collusion to exist.

(See 17th interrogatory & answer.)

The 7th, 8th, & 9th instructions were all based upon the theory that the jury would not find collusion to exist between Morse and Dunphy.

As such collusion was found to exist by a preponderance of evidence as required by the court, there was no necessity for the instructions, even if they had been proper.

The defendants certainly cannot complain of the refusal of the court to give the 10th instruction, as the court did not instruct the jury
422 that remaining in possession was an evidence of fraud.

As to the 11th instruction the defendants certainly suffered nothing by its refusal, as the jury found that it was not apparent to the world that Morse had ceased to be owner and that he did not remain in possession, and exercise control as the subordinate and clerk of Dunphy.

There was no need of such an instruction, as the facts involved in the instruction were submitted to the jury for the information of the court.

The defendants cannot complain of the refusal of the court to give the 12th and 13th instructions, as the court gave no instructions
423 to the effect that remaining in possession by the Morses was either prima facie or conclusive evidence of fraud.

Indeed, if the court had given instructions 10th, 11th, 12th, and 13th asked for by the defendants, the jury would have been compelled to find the transfer fraudulent, finding as they did upon the question of possession.

The refusal of the instructions was clearly a benefit to the defendants.

As to the 14th instruction it is almost in the same language as that of the court as to finding any fact submitted to them when sustained by a preponderance of evidence.

424 This instruction, however, was improper and unnecessary, as no issue was submitted to the jury as to whether such an agreement as was testified to by Kleinschmidt was ever really executed.

As to the exception to the testimony of Kleinschmidt, (p. 133 & '4 of statement,) there is no exception on the ground that insufficient notice was given, but simply that the existence of the instrument in dispute was denied.

All the authorities agree that a party is confined to the point of the exception taken.

If there was anything in the exception, then Dunphy & Morse, by denying the existence of the writing, might exclude one hundred
425 witnesses as well as one from testifying to its contents.

Outside of this point the exception is general, and "a general objection to the admissibility of evidence cannot be made special for the first time in the Supreme Court."

2nd Cal. Dig., p. 27, sec. 370–'2, 368; (10th Cal., p. 32, 267; 5th Cal., p. 341.)

16th Cal., p. 531.

The above is respectfully submitted, in addition to the brief and points made in the oral argument.

THO'S THOROUGHMAN,
WOOLFOLK & TOOLE,
Att'ys for Respondent.

Filed Aug. 17th, 1869.

L. S. PECK, *Clerk*,
Per A. M. S. C.

426 And afterwards, to wit, on the 18th day of August, A. D. 1869, there was filed in open court a certified copy of the interrogatories and cross-interrogatories embraced in the deposition of Benajah Morse, filed herein, which said copy is in the words and figures following, to wit:

T. H. KLEINSCHMIDT ET AL.
vs.
E. M. DUNPHY, IMPL'D WITH B. MORSE, SURVIVOR OF E. & B. MORSE.

Interrogatories to be propounded to Benajah Morse, a witness to be produced, sworn, and examined on the part of the defendants.

Int. 1. What is your age, and present place of abode?

Int. 2. Where were you residing in the year 1867 & 1868, and in what business were you engaged, and with whom?

427 Int. 3. Did you on the 31st day of October, 1867, execute, with your brother, E. Morse, the note and mortgage mentioned in the answer of E. M. Dunphy, filed in this cause? If so, state what was the consideration of said note and mortgage. State all the particulars relative to the indebtedness, if any, of E. & B. Morse to said Dunphy, and why the said mortgage was so given.

Int. 4. At what time, if ever, did you deliver possession of the property covered by and included in said mortgage to said Dunphy.

Int. 5. If you should state that said property was delivered to said
428 Dunphy, state whether you ever resumed the possession thereof;

and, if so, when, and state fully as to any subsquent connection of yours with said property.

Int. 6. State whether or not you made any collections on account of the old indebtedness of parties to yourself and Elkanah Morse; and, if so, for whom did you make such collections.

Int. 7. Did you, after the delivery of the mortgaged property to Dunphy, make sale of any of the goods; and, if so, under what circumstances, and who was present at any of said times?

Int. 8. State whether any arrangement was made between yourself and Dunphy relative to your assisting him in making collections and attending to any business with which E. & B. Morse had formerly been connected; and, if so, state what the arrangement was, and the reason for making it, and what you did under it.

Int. 9. State whether or not any paper was executed by Dunphy to E. & B. Morse, or either of you, to the effect that he, Dunphy, would cancel the mortgage whenever E. & B. Morse, or either of them, wanted him to do so.

Int. 10. State anything else you know material to the issues in this cause.

W'M CHUMASERO,
W. F. SANDERS, & OTHERS,
Att'ys for Dunphy.

The foregoing is endorsed:

"Settled by H. Knowles, associate justice of S. C. for M. T." Filed Oct. 27, '68. Cha's W. Fowler, cl'k, by Cha's G. Reynolds, D. C.

T. H. KLEINSCHMIDT AND CHARLES C. DUER, pl'ffs,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF E. & B. Morse, and E. M. Dunphy, def'ts.

In the 3rd judicial district, Lewis & Clarke County, Montana Territory.

Cross-interrogatories on the part of plaintiffs.

1st. Did E. & B. Morse, or either of them, owe E. M. Dunphy ($30,000) thirty thousand dollars on the 31st day of October, A. D. 1867, at the time the mortgage was executed?

2nd. Was there not an understanding between E. & B. Morse & E. M. Dunphy, at the time the said mortgage was executed, that he was not to receive or collect from you, or either of you, the sum of thirty thousand dollars?

3rd. Was there not an understanding between E. & B. Morse and E. M. Dunphy, at the time of and after the excution of said mortgage, that E. & B. Morse should deliver the said Dunphy one thousand sacks of flour in full payment of whatever indebtedness was due him from them?

4th. Was there no agreement between E. & B. Morse and E. M. Dunphy, before or after the execution of said mortgage, for the delivery to him of one thousand sacks of flour in payment of what you owed him?

5th. Did you not tell divers persons, after the execution of said mortgage, that you only owed Dunphy one thousand sacks of flour?

6th. Did you not continue to deliver flour to E. M. Dunphy after the execution of the mortgage in payment of your indebtedness to him?

7th. How much flour did you deliver to Dunphy after the 31st of October, A. D. 1867?

8th. How much money or property did you have when you left Montana?

(Objected to as irrelevant by def'ts' att'y.—W. C.)

433 9th. How much money or property have you now; and from whom did you obtain it?

(Objected to as irrelevant by def'ts' att'y.—W. C.)

(Cross-interrogatories endorsed same as interrogatories.)

Territory of Montana, county of Lewis & Clarke, district court, 3rd judicial district.

I, Cha's W. Fowler, clerk of said court, do hereby certify that I have compared the foregoing copy of interrogatories and cross-interrogatories in the case of Kleinschmidt et al. vs. E. M. Dunphy, impl'd with B. Morse, surviving partner of E. & B. Morse, with the original of the same now remaining on file in my office; that it is a true transcript therefrom, and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 16th day of August, A. D. 1869.

[SEAL.] CHA'S W. FOWLER, *Clerk.*

434 And afterwards, to wit, on the 23d day of August, A. D. 1869, the decree of the court below was affirmed, and the opinion of the court delivered by his honor Chief Justice Warren, in the words following, to wit:

Opinion by Warren, chief justice.

THEODORE H. KLEINSCHMIDT ET AL., Plaintiffs and respondents,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, and Elijah M. Dunphy, appellants and defendants.
} Civil action.

In the supreme court of the Territory of Montana, August term thereof, A. D. 1869.—Appeal from Lewis & Clarke County.

435 This was an action brought by respondents, as judgment creditors of the partnership firm of E. & B. Morse, to set aside a mortgage executed by said firm to defendant Dunphy as fraudulent, and to subject the property conveyed thereby, in the hands of Dunphy, to payment of their respective judgments.

The cause was tried at the March term (1869) of the district court in and for Lewis & Clarke County, before Knowles, judge, and a jury. The court submitted to the jury certain issues or questions of fact, and directed written findings thereon.

The jury returned their written findings upon the questions of fact, signed by their foreman, and by three of the jurors as dissenting therefrom.

436 The appellants filed objections to entry of the findings of the jury, which was overruled, and the findings were entered and approved by the court; and on the same day appellant Dunphy filed notice

of a motion for a new trial on the grounds of insufficiency of the evidence, of errors in law occurring at the trial, of newly-discovered evidence, and of error in the entry of the findings of nine of the jurors; and filed affidavits in support of his motion.

On April 2nd, 1869, the court entered a decree in accordance with the facts found by the jury, and afterwards, on hearing of the motion for a new trial, overruled the same.

Defendant Dunphy appeals from the decree, and from the order overruling the motion for a new trial, and assigns several causes of error.

437 So far as the order overruling the motion for a new trial is concerned, it is only necessary to say that where evidence is conflicting, the jury are to determine the facts, and their verdict will not be disturbed unless clearly unsupported by evidence before them. No error in law occurring at the trial is specified other than will be considered in discussing errors assigned in statement on the appeal; and the affidavits filed disclosing newly-discovered evidence show that evidence to have been of a cumulative character, and hence we hold the court below did not err in overruling the motion.

The statement on appeal assigns nine specifications of error,

438 but on the hearing in this court, appellant in his brief and argument relies upon but three, which we will consider in order:

The first error assigned is in permitting parol evidence to be given of a writing alleged to have been executed by defendant Dunphy, the existence of which was controverted by appellants.

The question of the existence of facts constituting a foundation for the admission of secondary evidence was one for the determination of the court under the rules of evidence, and while the evidence was conflicting the record seems to sustain the action of the court in permitting parol evidence of the contents of the paper to go to the jury.

439 The second error assigned is in admission of the declarations of defendants below, E. Morse and B. Morse respectively, concerning the conveyance executed by them to defendant, Dunphy, made in the absence of Dunphy.

The record shows that before these statements of the Morses were admitted, evidence had been introduced tending to show complicity and collusion between Dunphy and the Morses in respect to the conveyance in question, which was sufficient to make competent the admissions of one as against the others.

The next error assigned is in allowing the findings of but three-fourths of the jury—three dissenting therefrom—to be received and en-

440 tered, and in entering the decree upon such findings.

By stipulation the following causes, to wit, Con. Bray vs. George L. Batchelder, A. J. Snyder vs. William Tiernan, and Henry Siegel et al. vs. Jones & Lott, are submitted, subject to the determination of this question, which is one of a most interesting and important character.

The act of the legislative assembly of the Territory approved Dec. 23, 1867, known as the civil practice , enacts that "there shall be in this Territory but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs," (sec 1;) and that "an issue of fact shall be tried by a jury, unless a

441 jury trial is waived, or a reference be ordered as provided in this act," (sec. 155.)

Section 15 of the act approved Jan'y 15, 1869, provides that "in all civil cases, if three-fourths of the jurors agree upon a verdict, it shall stand and have the same force and effect as if agreed upon by the whole of the jurors."

It is claimed in all the cases under consideration in which the question is involved, that the last-mentioned act is in contravention of Article VII of the amendments to the Constitution of the United States, and therefore void.

We will first consider the question generally, and then apply the principle involved to the several cases submitted.

442 The article of the Constitution in question reads, that "in suits at common law, where the value at controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined by any court of the United States than according to the rules of the common law."

We are led in the first instance to consider the nature and extent of this restriction.

We believe it is admitted, and, at all events, it is too well settled to admit of question, that this article belongs to that class of limitations upon the exercise of power which were imposed by the Constitution upon the federal government, and which have no application to
443 the State governments in the exercise of those powers which were "reserved to the States respectively, or to the people."

The restriction is general, and applies to all the departments of the general government alike—especially to the legislative and judicial branches, to whom are assigned the functions of enacting and of construing the laws; so that neither can the Congress, by law, nor the national courts by their rules or in their practice, deny to a citizen the right thereby secured.

The several States, by their constitutions, may otherwise provide, although the principle is one of such ancient origin, and held by ourselves, in common with the nation from whom our jurisprudence is mainly
444 derived, in such high estimation that, with but few exceptions, it is incorporated in the constitutions of the different States of the Union, in its original form, and in many of them has been extended beyond the terms of the federal Constitution, and applied to trials of causes in equity as well as at common law, and regardless of the amount in controversy. In its application to the federal government, the right of trial by jury in civil cases has been held to apply only to the class of causes specified in this article—that is, causes at common law, as distinguished from causes of equity and of admiralty jurisdiction—and this construction is well settled by the courts. It remains, then, to determine how
444½ far this provision affects the powers of our territorial government; and to this end we must consider its source, nature, and extent.

The condition of a Territory of the United States is somewht anomalous. The extent of the powers of its local government, and the rights of its inhabitants, have furnished occasion not only for profound legal argument, but for great political dissension.

The power of Congress to legislate upon the local or domestic affairs of the people inhabiting a Territory has been strenuously denied, but at this time seems to be authoritatively established. Whether this power be derived, as claimed by some, from the constitutional right to make "all needful rules and regulations respecting the territory or other
445 property belonging to the United States," or be necessarily deducible, as contended by others, from the power to acquire and hold territory, it is unnecessary now to inquire.

In the exercise of this general power, Congress passed the act establishing and creating a temporary government for this Territory. This act distributes the powers of the local government among three departments, and ordains that the legislative power "shall extend to all rightful

subjects of legislation consistent with the Constitution of the United States, and the provisions of this act;" and provides that the judicial power shall be vested in certain courts, the jurisdiction of which
446 shall be limited by law; provided, that the supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction. The act also provides that the Constitution, and all the laws of the United States which are not locally inapplicable, "shall have the same force and effect within the Territory as elsewhere within the United States," and clothes the district courts created by it with the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested by law in the district and circuit courts of the United States. Can the legislature, or the courts thus established by law, or in their practice, deny the right of trial by jury in suits
447 at common law in which the value at controversy exceeds twenty dollars?

The argument of the respondent in this case has been that, while the territorial district courts, in addition to their local jurisdiction under the territorial laws and their chancery and common-law powers, are also vested with federal jurisdiction, they yet are not national or federal courts as established and contemplated by the Constitution, and hence that the constitutional restriction we are considering does not apply to trials of causes in such courts.

On the other hand, it is urged by the appellant the organic act performs the functions of a State constitution, and that, under its
448 express terms, all the general provisions of the federal Constitution apply to the territorial government.

It is certainly true that the territorial district courts are not federal courts, as contemplated by the Constitution. They are created by congressional enactment in the exercise of the power to govern territory of the United States, and must necessarily be restricted in their powers and jurisdiction to the limit of the power which created them. What that limit is we will consider hereafter.

It will be perhaps a digression to discuss the nature and extent of the powers vested in the district courts of the organic act; but as a subject which has attracted general interest and germane to the question before us, we will briefly refer to it.

449 The district court sits in two distinct capacities—as a local tribual, and also exercising the jurisdiction of a federal court.

As a local tribunal its practice and course of procedure, provided its common-law and chancery jurisdiction be not impaired, may be regulated by the local laws, which, however, must not infringe any principle of the Constitution or any act of Congress applicable to it; and we take occasion, although the question is not raised in the record of any of the causes now under consideration, to suggest to the legislative assembly, as well as to the legal profession of the Territory, whether the civil practice act now in force, or the construction heretofore placed upon
450 it, in so far as it permits legal and equitable claims or defenses to be united, be not erroneous.

The Supreme Court of the United States in Thompson vs. Railroad Companies, (6 Wallace's Reports,) hold that "the Constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law and in equity, as distinguished and defined in that country from which we derive our knowledge of these principles, and although the forms of proceedings and practice in the State courts shall have been adopted in the circuit courts of the United States, yet

the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and
451 equitable claims to be blended together in one suit."

If it be true, as held, that the Constitution and the acts of Congress recognize and establish the distinction between law and equity, can the legislative assembly of the Territory, under the organic act, abolish in the territorial district courts, even while sitting as local tribunals, that distinction?

As federal courts, the district courts are understood to be governed in all cases at common law by the local rules of decision and of practice where the Constitution or statutes of the United States do not otherwise provide; while in causes in equity the proceedings must conform to the rules governing causes in equity, notwithstanding the legislative assembly have by statute abolished the distinction between forms
452 of proceedings at law and in equity, and have established but one form and course of proceeding in all civil actions.

But to return:

The right of jury trial secured by the article of the Constitution under consideration referring only to trials in the national courts established by the Constitution, and the territorial district courts, at least while in the exercise merely of their local jurisdiction, not being embraced under its provisions, it is urged that the court below did not err in receiving the findings and rendering the decree in the principal cause now under consideration. This proposition assumes that the cause is one at
453 common law, and for the present we will so assume.

This position could only be maintained by holding that while the constitutional restriction applied to the federal judiciary, it did not extend to the legislative power intended to be restricted.

We have already stated that it was designed to restrict all the departments of the federal government, legislative as well as judicial.

If, then, it is restrictive upon Congress as well as upon the federal courts, can Congress, in the exercise of its power to govern a Territory, create a local legislature or local courts, and delegate to either a power, which it does not itself possess, to deny the right in question?

We think clearly it cannot. Even without the provision in
454 the organic act that the Constitution and laws not locally inapplicable shall have the same force and effect in the Territory as elsewhere within the United States, the conclusion would be the same.

Congress has no power, either directly, or by a delegation of power to another body of its own creation, to deny to a citizen of a Territory the right to a trial by jury in a suit at common law where the value at controversy exceeds twenty dollars. It is further contended, however, that inasmuch as the act of the legislative assembly requires the same number of jurors as the common law, it is not an infraction of the Constitution. This position is not tenable. "Trial by jury," as the words
455 are used in the Constitution, had, at the time of its adoption a fixed legal signification, and from time immemorial has meant a trial by a tribunal of twelve men acting only upon a unanimous determination. The origin of this mode of trial is lost in the dimness of the past; but, from the earliest period down to the time of the adoption of the Constitution, unanimity of twelve jurors alone has constituted a legal verdict. If the legislative assembly could dispense with one attribute or essential of a verdict, it could as well destroy the other, or repeal the right altogether.

It can do neither, and hence the act in question is, in so far as
456 it applies to actions at common law in which the value at contro-

versy exceeds twenty dollars, unconstitutional and void. The causes before mentioned of Bray vs. Batchelder, Snyder vs. Teernan, & Siegel et al. vs Jones & Lott, are all common-law causes, and embraced within the foregoing principle, and the judgments in them must be reserved, and the causes remanded for new trial.

The cause at bar, (Kleinschmidt vs. Dunphy et al.,) however, is clearly one of chancery jurisdiction, and it remains now to consider the statute in reference to trials of causes in equity.

The right of jury trial is not secured by the Constitution in causes of equity jurisdiction, and in the absence of statutory enactment,
457 federal or territorial, it does not exist. In such cases, the chancellor might, according to the established rules of chancery practice, call a jury to his aid to determine questions of fact arising upon the hearing. Such verdict, however, would be merely advisory, and addressed solely to the conscience of the chancellor, who might wholly disregard it.

We have seen that the civil practice act has provided the same manner of disposing of issues of fact in all civil cases, whether in law or in equity.

It follows, from what we have said, that the legislative assembly has the same power as Congress within the limitations of the grant of power to it contained in the acts of Congress and the Constitution. Could Congress confer the right of trial by jury of issues of fact in
458 causes in equity in the federal courts; and could Congress by law dispense in such causes with the requisites of a common-law jury either in respect to number or unanimity? We think it could. We find nothing in the Constitution preventing the exercise of such power. Hence we conclude that the legislative assembly also possesses the power under the organic act, as being a subject of rightful legislation, and contravening no provision of the Constitution or of the acts of Congress. This power they have exercised, and it is the province of the judiciary to construe and not to make laws, and in construing to give effect to them, so far as it may be done.

We conclude, then, that the act in question, so far as it relates to
459 trial of issues of fact in causes in equity, is constitutional and valid.

The other errors assigned in the statement on appeal in this case were not urged in the briefs or arguments in this court, and we will only notice the refusal of the court to give the instructions asked by both parties.

The court submitted to the jury only specific questions of fact, and gave all the instructions necessary in regard to the questions submitted, as no general verdict was required.

On examination of the whole record, we find no error sufficient to warrant a new trial.

The decree of the court below is affirmed, with costs.

H. L. WARREN, *C. J.*

Knowles, J., & Symes, J., concurring.

460 And afterwards, to wit, on the said 23d day of August, A. D. 1869, the appellant by his counsel excepts in open court to the decree affirming the judgment of the court below, as rendered in the opinion of the chief justice as aforesaid, and asks for twenty days' stay of proceedings, to perfect an appeal to the Supreme Court of the United

States. Motion for twenty days' stay of proceedings was denied. Appeal to the Supreme Court of the United States was granted by the court, and a stay of proceedings for ten days allowed to defendant and appellant to perfect his said appeal as aforesaid.

461 And afterwards, to wit, on the 31st day of August, A. D. 1869, said E. M. Dunphy, defendant and appellant, filed his bond on the appeal of said cause to the Supreme Court of the United States, in the words and figures following, to wit:

Supreme Court of the United States.

ELIJAH M. DUNPHY, APPELLANT, *vs.* T. H. KLEINSCHMIDT & OTHERS, APPELLEES. } Appeal from supreme court, Montana Territory.

Know all men by these presents that we, Elijah M. Dunphy, as principal, and David A. Bently, J. J. Downhour, C. L. Dunphy, Dan'l Small, T. E. McKoin, and Joseph S. Wilson, as sureties, are held
462 and firmly bound unto T. H. Kleinschmidt & Charles E. Duer in the penal sum of eighty-six thousand four hundred dollars, to be paid to the said T. H. Kleinschmidt & Cha's E. Duer; to which payment, well and truly to be made, we bind ourselves, our heirs or , jointly and severally, firmly by these presents, sealed with our seals and dated this 24th day of August, 1869.

Whereas the above-named Elijah M. Dunphy hath taken an appeal to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the supreme court of the Territory of Montana, at the August term of said supreme court, A. D. 1869:

Now, therefore, the condition of this obligation is such, that if
463 the said Elijah M. Dunphy shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; otherwise the same shall be and remain in full force and effect.

ELIJAH M. DUNPHY. [SEAL.]
T. E. McKOIN. [SEAL.]
J. J. DOWNHOUR. [SEAL.]
C. L. DUNPHY. [SEAL.]
JOSEPH S. WILLSON. [SEAL.]
DAVID A. BENTLY. [SEAL.]
DANIEL SMALL. [SEAL.]

Sealed and delivered in presence of—
R. E. ARICK.

TERRITORY OF MONTANA,
Lewis & Clark County, ss:

David A. Bently, being duly sworn, says that he is worth the sum of sixty thousand dollars over and above all his debts, liabilities, and exemptions.

D. A. BENTLY.

Subscribed & sworn before me this 24th day of August, 1869.
R. E. ARICK,
Notary Public.

464 TERRITORY OF MONTANA,
Lewis & Clark County, ss:

J. J. Downhour, C. L. Dunphy, & T. E. McKoin, being duly sworn, each for himself says that he is worth the sum of five thousand dollars over and above all his debts, liabilities, and exemptions.

J. J. DOWNHOUR.
C. L. DUNPHY.
T. E. McKOIN.

Subscribed & sworn before me this 25th day of August, A. D. 1869.

R. E. ARICK,
Notary Public.

TERRITORY OF MONTANA,
Gallatin County:

Daniel Small, being duly sworn, says that he is worth the sum of eight thousand dollars over and above all his debts, liabilities, and expenditures.

DANIEL SMALL.

Subscribed & sworn before me this 27th day of August, A. D. 1869.

A. KEATON,
Justice of the Peace.

465 TERRITORY OF MONTANA,
Gallatin County:

Joseph S. Wilson, being duly sworn, says he is worth the sum of four thousand dollars over and above all his debts, liabilities, and expenditures.

JOSEPH S. WILSON.

Subscribed & sworn before me this 27th day of August, A. D. 1869.

A. KEATON,
Justice of the Peace.

Endorsed on the above bond as follows:

E. M. Dunphy et al. vs. T. H. Kleinschmidt et al. Appeal bond. Filed and approved Aug. 31st, A. D. 1869.

LUCIUS S. PECK,
Clerk Sup. Court of the Territory of Montana.
By M.

466 And afterwards, to wit, on the said 31st day of August, A. D. 1869, the aforesaid bond on the appeal was accepted, and approved as sufficient, by Hon. G. G. Symes, one of the associate justices of the supreme court of Montana Territory, in the words and figures following, namely:

In sup. court Montana Territory.

THEODORE H. KLEINSCHMIDT ET AL., PL'FFS & respondents,
vs.
BENAJAH MORSE, SURVIVING PARTNER OF THE late firm of E. & B. Morse, & Elijah M. Dunphy, defendants and appellant.

I, G. G. Symes, associate justice of the supreme court of the Ter-

ritory of Montana, do hereby approve of the bond executed by E.
467 M. Dunphy, David A. Bently, & others, to said respondents, on the appeal taken in this cause to the Supreme Court of the United States from the decree of the supreme court of said Territory, affirming the decree of the district court of the 3rd judicial district in & for said Territory. Said bond to be filed, and when filed to operate as a supersedeas.

Helena, Aug. 31, 1869.

G. G. SYMES,
Associate Justice of Sup. Court of Montana Territory.

Filed Sept. 3rd, 1869.

LUCIUS S. PECK,
Clerk Sup. Court Montana Territory,
By M.

468 And afterwards, to wit, on the 13th day of September, A. D. 1869, the following citation was issued by and under the hands of his hon., H. L. Warren, chief justice of the supreme court of Montana Territory, to wit:

T. H. KLEINSCHMIDT & CHARLES E. DUER, Appellees,
vs.
E. M. DUNPHY AND BENAJAH MORSE, surviving partner, &c., appellant.

United States of America to T. H. Kleinschmidt & Charles E. Duer:

GENTLEMEN: You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Wash-
469 ington on the first Monday in December next, pursuant to an appeal taken in the above-entitled cause from the supreme court of Montana Territory, wherein you are appellees & defendants in error, and the said E. M. Dunphy appellant, then and there to show cause, if any there be, why the judgment of the supreme court aforesaid should not be reversed and errors corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. H. L. Warren, chief justice of the said supreme court of Montana Territory, this 13th day of September, A. D. 1869.

H. L. WARREN,
Chief Justice aforesaid.

470 Endorsed on the foreging citation is the following return of the marshal of his doings thereunder:

Served on the within-named T. H. Kleinschmidt and Cha's E. Duer, by showing them this citation, and delivering to each a copy thereof, this 29th day of September, 1869.

W. F. WHEELER,
U. S. Marshal.

Fees.

2 copies	80
2 do. served	4 00
Mileage, 120, @ 6c	7 20
	$12 00

Filed Oct. 23, 1869.

L. S. PECK,
Clerk S. C. M. T.

471 UNITED STATES OF AMERICA.
In the Supreme Court of Montana Territory:

I, Lucius S. Peck, clerk of said court, do hereby certify that the foregoing is a full, true, and correct copy of the original transcript from the third judicial district court, in and for the county of Lewis and Clarke, and Territory of Montana, in the cause of Theodore H. Kleinschmidt and Charles E. Duer, plaintiffs and appellees, and Benajah Morse, surviving partner of the late firm of E. & B. Morse, and Elijah M. Dunphy, defendants and appellants, on the appeal, and also of the proceedings in said cause in the supreme court of said Territory, at the August term thereof, A. D. 1869, and subsequent thereto.

472 Witness my hand and the great seal of said supreme court at Virginia City, in said Territory, this the 27th day of October, A. D. 1869.

[SEAL.] LUCIUS S. PECK, *Clerk*,
Per ALDEN, *Deputy*.

[Five-cent internal revenue stamp affixed and cancelled.]

473 T. H. KLEINSCHMIDT & CHARLES E. Duer, appellees,
vs.
E. M. DUNPHY, & BENAJAH MORSE, SURVIVING partner, &c., appellant.

United States of America to T. H. Kleinschmidt & Charles E. Duer:

GENTLEMEN: You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to an appeal taken in the above-entitled cause from the supreme court of Montana Territory, wherein you are appellees & defendants in error, and the said E. M. Dumphey, appellant, then and there to show cause, if any there be, why the judgment of the supreme court aforesaid should not be

474 reversed, and errors corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. H. L. Warren, chief justice of the supreme court of Montana Territory, this 13th day of September, A. D. 1869.

H. L. WARREN,
Chief Justice aforesaid.

475 Served on the within-named T. H. Kleinschmidt and Cha's E. Duer, by showing them this citation, and delivering to each a copy thereof, this 29th day of September, 1869.

W'M F. WHEELER,
U. S. Marshal.

Fees.

2 copies	80
2 " served	4 00
Milage, 120, @ 6 c	7 20
	$12 00

(Indorsed:) Supreme Court U. S. 1869, December term. No. 352. Dunphy, app't, vs. Kleinschmidt & Duer. Citation & service. Filed 17 January, 1870.

(Indorsement on cover:) No. 352. Elijah M. Dunphy, appellant, vs. T. H. Kleinschmidt and Charles E. Duer. Montana sup. court. Filed 11th December, 1869.

Supreme Court of the United States.

DECEMBER TERM, 1870.

ELIJAH M. DUNPHY, APPELLANT,
vs.
THEODORE H. KLEINSCHMIDT AND OTHERS, APPELLEES.

BRIEF OF LYMAN TRUMBULL, OF COUNSEL FOR APPELLANT.

This is a creditors' bill filed by Kleinschmidt, in behalf of himself and such other judgment creditors of Benajah Morse, surviving partner of the late firm of E. & B. Morse, as may choose to come in, against said Benajah Morse and Elijah M. Dunphy, in the 1st judicial district of Montana Territory. The bill or complaint, there being but one form of civil action in Montana, alleges the recovery of a judgment of $16,957.50 by Kleinschmidt, March 12, 1868, in the county of "Lewis and Clark," 3d judicial district of Montana, against the said Benajah Morse, surviving partner, the issuing of an execution on said judgment, directed to the sheriff of Gallatin county, the place of residence of said Morse, and its return by the sheriff of Gallatin county "*wholly unsatisfied;*" that October 31, 1867, the said Benajah Morse, together with his brother, Elkana Morse, executed to Dunphy, the appellant, a mortgage on certain described property of the value of $70,000, purporting to secure an indebtedness of $30,000 due from them to Dunphy; that at the time of the execution of the mortgage, E. & B Morse were indebted to Erfort and Petering, of St. Louis, in over $16,000, which was afterwards assigned to complainant, Kleinschmidt, and for which he subsequently obtained said judgment, in the county of Lewis and Clark, against

the surviving partner; that said E. & B. Morse were also indebted to various other parties at the time of executing said mortgage to the aggregate sum of $15,000; that "the greater part of the property embraced in the said mortgage consisted of accounts, wheat, hay, store goods, cattle, and other perishable property; that the mortgage, by its terms, provided that the said E. & B. Morse might remain in possession and use of said property for the period of one year, or until the maturity of the fictitious indebtedness therein mentioned, and that by its terms the said conveyance clearly manifests that it was made in trust for the use of E. & B. Morse, the persons making the same, and it is consequently void as against the plaintiff and other creditors of E. & B. Morse;" that it was made with the intent to delay and defraud the creditors of E. & B. Morse; that Dunphy was privy to such intent, and did not take the possession or control of any part of the property for several months after the mortgage was executed; that E. & B. Morse were not indebted to Dunphy more than six or seven thousand dollars, which was to be paid in flour; that on the 3d of January, 1868, Benajah Morse, the surviving partner, executed to Dunphy an assignment of the property embraced in the mortgage, and authorized him to sell and dispose of the same, having due regard to the interests of the creditors of E. & B. Morse; that for several months after the assignment Morse continued in possession of said property, and that such assignment not being accompanied by immediate possession, was void as to plaintiff; that Benajah Morse and Dunphy are running off and disposing of the property so as to place the same beyond the reach of the creditors of E. & B. Morse; that Benajah Morse is wholly irresponsible, and that there is no property belonging to the late firm of E. &. B. Morse, or either of them, except what is embraced in the mortgage, and that Dunphy has not sufficient property,

other than that embraced in the mortgage, out of which the judgment of plaintiff could be satisfied. The prayer of the bill is, that the mortgage be declared void as against plaintiff and other judgment creditors; that a receiver be appointed to take possession of the property; that defendants be restrained from disposing of it; that the receiver pay out of the proceeds of the property the judgment of plaintiff, and if the property be insufficient, that plaintiff have judgment and execution against Dunphy for the balance.

Dunphy, in his answer to said complaint, which is sworn to, states his belief that a judgment was entered in plaintiff's favor against Benajah Morse, survivor, as alleged in the complaint; but alleges that at the sitting of the court, when said judgment was rendered, the attorneys of said Morse entered a special appearance only for the purpose of moving to quash the summons and the return thereon, which had been issued and made in said cause, which motion was sustained by the court, a certified copy of which order quashing the summons and return is annexed to and made part of his answer; that no other service of any process was, as he believes, ever made on said Morse, and no appearance entered for him; wherefore he insists that said judgment was improperly and illegally entered. He admits the issuing of an execution on said illegal judgment, but "does not know whether a transcript was filed as stated in said complaint, nor whether said execution was returned unsatisfied or not." He admits the execution of a mortgage to him by E. & B. Morse, and makes certified copy part of answer; denies that it was made to delay or defraud creditors, but alleges that it was made only for the purpose of securing to the defendant money actually due, and to become due, as stated in the mortgage; and "that at the date of the execution of the said mortgage there was actually due and owing to him from the E. & B. Morse, for goods, wares,

and merchandise which had been actually sold and delivered to them by defendant, the sum of twelve thousand five hundred dollars ; and that this defendant applied to said E. & B. Morse to secure him, which they at first declined doing ; and the next day after defendant had so applied they offered, provided said defendant would advance them ten thousand dollars in money, in addition to said indebtedness, they would pay him interest thereon at the rate of five per cent. per month, and that they would give him the said security; which this defendant consented to do, and did advance to them the said sum of ten thousand dollars in United States treasury notes. Whereupon the said E. & B. Morse did execute and deliver to this defendant their note for thirty thousand dollars, which sum included the interest thereon and on said bills of goods so sold to them up to the time of the maturity of the said note ; and also, at the same time, executed the aforesaid mortgage to secure the payment of the same, and which is the actual indebtedness due from said E. & B. Morse to this defendant. And he absolutely denies that any part thereof was or is fictitious, but avers that it was and is an actual, *bona fide*, existing indebtedness, due and owing from said E. & B. Morse to this defendant."

He admits that B. Morse is sole surviving partner of the late firm of E. & B. Morse, but denies that any of the property is being disposed of or run off to place it beyond the reach of creditors ; admits that he has sold a portion of the mortgaged property and has received on account of the amount due him about $16,000 ; admits the agreement with B. Morse of January 3, 1868, by which he was to take possession of the mortgaged property and sell the same to satisfy his debt, and makes an exhibit of same as part of his answer ; that he did take possession of a portion of said property, from which he realized the aforesaid sum of $16,000, and alleges that he has faithfully and fairly acted under said agreement, has used his best

endeavors to sell and dispose of the property so as to save the same from sacrifice, and that he believes that from the property he has reduced to possession he will barely be able to make himself good, and he denies all the material allegations of the complaint which are inconsistent with the answer.

The other defendant, Morse, after filing an answer, which was duly sworn to, denying all the material allegations of the complaint, and sustaining Dunphy's answer in all respects, withdrew all further defence or appearance in the case.

Plaintiff, in his replication, admits the quashing of the summons in the case of Klienschmidt *vs.* B. Morse, survivor, but denies that there was no other or further appearance entered.

At a subsequent period, Charles E. Duer filed his petition, and was admitted to become a party [illegible] Klienschmidt. Duer alleges that on the [illegible] 1868, in the county of Lewis and Clark, [illegible] judgment against Benajah Morse, surviving [illegible] for the sum of $15,410; that on the 19th o[illegible] an execution was issued on this judgment directed to the sheriff of Gallatin county, the residence of defendant, and returned wholly unsatisfied; that on the 9th of May, 1868, an alias execution was issued to the sheriff of Lewis and Clark county, which was returned unsatisfied except as to $250, and $355.15 applied to payment of costs; that he was a judgment creditor of B. Morse at the time said creditor's bill was filed.

Dunphy, in his answer to Duer's complaint, alleges that the execution issued to Gallatin county, after being levied on property sufficient to satisfy the same, was returned unsatisfied by Duer's direction; that the execution issued to Lewis and Clark county was levied upon property sufficient to satisfy the same, and that said property has never been sold.

and merchandise which had been actually sold and delivered to them by defendant, the sum of twelve thousand five hundred dollars ; and that this defendant applied to said E. & B. Morse to secure him, which they at first declined doing ; and the next day after defendant had so applied they offered, provided said defendant would advance them ten thousand dollars in money, in addition to said indebtedness, they would pay him interest thereon at the rate of five per cent. per month, and that they would give him the said security; which this defendant consented to do, and did advance to them the said sum of ten thousand dollars in United States treasury notes. Whereupon the said E. & B. Morse did execute and deliver to this defendant their note for thirty thousand dollars, which sum included the interest thereon and on said bills of goods so sold to them up to the time of the maturity of the said note ; and also, at the same time, executed the aforesaid mortgage to secure the payment of the same, and which is the actual indebtedness due from said E. & B. Morse to this defendant. And he absolutely denies that any part thereof was or is fictitious, but avers that it was and is an actual, *bona fide*, existing indebtedness, due and owing from said E. & B. Morse to this defendant."

He admits that B. Morse is sole surviving partner of the late firm of E. & B. Morse, but denies that any of the property is being disposed of or run off to place it beyond the reach of creditors ; admits that he has sold a portion of the mortgaged property and has received on account of the amount due him about $16,000 ; admits the agreement with B. Morse of January 3, 1868, by which he was to take possession of the mortgaged property and sell the same to satisfy his debt, and makes an exhibit of same as part of his answer ; that he did take possession of a portion of said property, from which he realized the aforesaid sum of $16,000, and alleges that he has faithfully and fairly acted under said agreement, has used his best

endeavors to sell and dispose of the property so as to save the same from sacrifice, and that he believes that from the property he has reduced to possession he will barely be able to make himself good, and he denies all the material allegations of the complaint which are inconsistent with the answer.

The other defendant, Morse, after filing an answer, which was duly sworn to, denying all the material allegations of the complaint, and sustaining Dunphy's answer in all respects, withdrew all further defence or appearance in the case.

Plaintiff, in his replication, admits the quashing of the summons in the case of Klienschmidt *vs.* B. Morse, survivor, but denies that there was no other or further appearance entered.

At a subsequent period, Charles E. Duer filed his petition, and was admitted to become a party plaintiff with Klienschmidt. Duer alleges that on the 12th of March, 1868, in the county of Lewis and Clark, he recovered a judgment against Benajah Morse, surviving partner, &c., for the sum of $15,410; that on the 19th of March, 1868, an execution was issued on this judgment directed to the sheriff of Gallatin county, the residence of defendant, and returned wholly unsatisfied; that on the 9th of May, 1868, an alias execution was issued to the sheriff of Lewis and Clark county, which was returned unsatisfied except as to $250, and $355.15 applied to payment of costs; that he was a judgment creditor of B. Morse at the time said creditor's bill was filed.

Dunphy, in his answer to Duer's complaint, alleges that the execution issued to Gallatin county, after being levied on property sufficient to satisfy the same, was returned unsatisfied by Duer's direction; that the execution issued to Lewis and Clark county was levied upon property sufficient to satisfy the same, and that said property has never been sold.

Duer, in his replication, denies that the execution to Gallatin county was returned unsatisfied, by his direction, "until every means had been exhausted, without avail, to obtain a levy of said execution upon property embraced in said mortgage to E. M. Dunphy;" admits that the execution to Lewis and Clark county was levied upon certain flour, but alleges that "all the flour levied upon on said execution had been turned over to J. J. Hull, receiver in this cause." At the June term, 1868, of the 1st judicial district in the county of Gallatin, the "pleadings and the issues joined" were submitted to a jury, before whom the cause was tried, but who, failing to agree, were discharged.

The venue was subsequently changed to the county of Lewis and Clark, in the 3d judicial district, where another trial was had before a jury.

The record contains an entry in these words: "Propositions to be submitted to the jury;" of which propositions there are twenty-two, but there is no order directing a feigned issue, or for submitting anything to a jury. Before the jury retired, they were instructed by the court as follows: "If nine of the jury find, from the evidence, an answer to any proposition presented to you, you will return it as your finding; the foreman will sign it as that of the jury, and those not agreeing to the finding of the nine had better write their names opposite to that of the foreman as dissenting." (Record, 80.)

The whole case was not passed upon by the jury, nor does the record contain any order of the court submitting anything to them, but answers were returned to twenty-two propositions, relating chiefly to the character of the indebtedness to Dunphy, and to the value and possession of the mortgaged property. None of the answers to any of the propositions, at all material to a disposition of the case, were unanimous, but at least three of the jurors dissented, as the record shows, to the answers given by the other nine.

The entry of record is in these words:

"On the 25th of March, 1869, the jury in open court returned the following findings of fact of nine of the jury, three of the jurymen, to wit, Charles Rice, G. W. Tubbs, and J. J. Downhour, dissenting."

Then follow the propositions submitted to the jury and the answers, in this form:

"9th. Did the mortgage to Dunphy prevent the collection of the judgments of Klienschmidt and Duer?

"Answer. Yes. P. Woods, foreman; Charles Rice, G. W. Tubbs, J. J. Downhour, dissent." (Printed Record, 80, 81.)

Objection was made at the time to the recording and entry of the agreement of the nine jurors as the verdict of the jury, but the court overruled the objection.

The defendant then gave notice of his intention to move for a new trial. Record, 84.

At a subsequent day the formal motion for a new trial was filed. (Record, 85.) The court, after hearing the motion, overruled the same and entered the following decree:

"Whereas, on the 12th day of March, A. D. 1868, Theodore H. Kleinschmidt recovered a judgment in this court against Benajah Morse, the above-named defendant, for the sum of sixteen thousand eight hundred and eighty dollars; and whereas, on the said 12th day of March, A. D. 1868, Charles E. Duer also recovered a judgment in this court against the said Benajah Morse for the sum of fifteen thousand four hundred and ten dollars and five cents, both of said judgments being recovered against the said Benajah Morse as surviving partner of the late firm of E. & B. Morse;

"And whereas executions issued upon said judgments were returned wholly unsatisfied, the entire property of E. & B. Morse being covered by a mortgage executed by them to E. M. Dunphy, for thirty thousand dollars, on the 31st day of October, A. D. 1867;

"And whereas, on the 30th day of April, A. D. 1868,

By section 15 of an act to amend the civil practice act, passed January 15, 1869, session acts of 1868-9, p. 66, it is declared: "In all civil cases, if three-fourths of the jurors agree upon a verdict, it shall stand, and have the same force and effect as if agreed upon by the whole of the jury."

By act of December 31, 1864, Laws of Montana Territory, 339, sec. 3, it is provided that mortgages of personal chattels, if acknowledged and recorded and *bona fide*, shall be good for one year, notwithstanding the property mortgaged may be left in the possession of the mortgagor, provided that such conveyance shall provide for the property so to remain with the mortgagor.

This case seems to have been trie in the court below partly as an action at law, and partly as a proceeding in chancery, and the record is as confused as are the statutes of Montana, which mix up equity and common law proceedings in the same case. The decree is a judgment of $35,737.50, in favor of different plaintiffs, jointly, who claim different amounts under distinct and separate judgments. It is uncertain in that it directs "the judgment to be credited by the money in the possession of the receiver," without specifying how much that is, nor does the record contain any order appointing a receiver, and it is only by this statement in the decree, the allegation in the replication of Duer, that "all the flour levied upon on said execution was turned over to J. J. Hull, receiver," (Record, 28,) and the testimony of some of the witnesses, who speak of a receiver, that it can be ascertained that there ever was a receiver in the case. The record wholly fails to show any appointment of a receiver, or report from him, and it nowhere appears what property went into his hands, what he has done with it, or how much money he has. Dunphy was certainly entitled to a credit on the judgment against him to the extent of the amount of money in the receiver's hands. How was he to get it when

the record contains no report from the receiver, although it does show, by the admission of one of the plaintiffs, that certain flour went into his hands, but when, or how much, nowhere appears.

The decree is uncertain, and the record does not furnish the means of making it certain, and it should be reversed for that, if for no other cause.

Sec. 13 of the organic act of Montana Territory declares: "That the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of Montana as elsewhere within the United States." (13 Statutes at Large, 91.)

Sec. 9 of the organic act declares: "That the said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction." (13 Stat. at Large, 89.)

The laws of the United States, in conferring jurisdiction on the Federal courts, make a distinction between suits at common law or in equity to the same effect as is made in the organic act of Montana in the organization of the territorial courts.

In construing these laws this court has said: "The Constitution and laws of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceeding and practice in the State courts shall have been adopted in the circuit courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to

be blended together in one suit." (Thompson *v.* Railroad Co., 6 Wallace, 137; Robinson *v.* Campbell, 3 Wheaton, 212; McCullom *v.* Eager, 2 Howard, 64; Noonan *v.* Lee, 2 Black, 509; Bennett *v.* Butterworth, 11 Howard, 674; Payne *v.* Hook, 7 Wallace, 430.)

"Wherever a case in equity may arise and be determined, the same principles of equity must be applied to it." (Neves *v.* Scott, 13 Howard, 272.)

Tested by these decisions, it may well be questioned whether so much of the Montana statute as abolishes all distinction between cases at law and in equity, and requires issues of fact to be tried by a jury, is not inoperative and void. If valid, it was error to submit only part of the issues of fact to a jury. At all events, when a case comes here, this court will look to the subject-matter of the suit, and, if it be of an equitable character, will dispose of the case according to the principles and practice of the high Court of Chancery in England, as they have been modified by its rules. "The laws or practice of the Territory cannot regulate the process by which this court exercises its appellate power." (Brewster *v.* Wakefield, 22 Howard, 128.)

The subject-matter of this suit is clearly one of equitable jurisdiction, and if the proceedings have not been according to the principles and practice in equity, as established by this court, the decree must be reversed. The decree does not profess to be based upon evidence submitted to the chancellor, and contained in the record, but upon the verdict of nine of twelve jurors on part only of the issues involved in the case. Is any such proceeding known to the equity practice of the United States courts, or to the practice of chancery courts in England, from which our system of equity jurisprudence is mainly derived?

It was held by the Supreme Court of Montana that the territorial statute giving the same force and effect to a

verdict of three-fourths of a jury as if it were rendered by the whole jury was repugnant to Article 7 of the amendments to the Constitution of the United States, so far as it related to suits at common law, but that such a verdict was good in an equity proceeding. (Record, 120.)

That the terms, "trial by jury," in so far as they regarded the number of the jury, and the unanimity of the verdict, had a definite and specific meaning at the time the Constitution was adopted, cannot be doubted. "Verdict is the unanimous decision made by a jury." (Bac. Abg., Title, Verdict.)

"If the jurors do not all agree in a verdict, the verdict is bad." (Bac. Ab., Title, Verdict, letter F; 3 Bl. Com., 376; Parsons *v.* Bedford, 3 Peters, 433.)

It is beyond the power of the legislature of Montana, or Congress even, materially to change the character of a jury as it was understood at the time the Constitution was adopted. "The number of jurors cannot be diminished, or a verdict authorized short of a unanimous concurrence of all the jurors." (Wook *v.* The State o[illegible] Ohio 306.)

If this suit is to be treated as a proce[illegible] law, it is manifest that to receive the ag[illegible] fourths of the jurors and give it the effe[illegible] the whole jury would be erroneous. It [illegible] ceded that the subject-matter of this su[illegible] able character; but the issues which w[illegible] the jury were issues which, according to the course of the English Chancery practice as adopted by the Supreme Court, could only be tried in a court of law. In a court of chancery there is no jury, and when in the opinion of the chancellor matters of fact are involved in a suit which ought to be passed upon by a jury, the practice is to direct a feigned issue to be made up, and it is sent to a common law court for trial. On the trial of this issue in the common law court, questions of law in regard to the

be blended together in one suit." (Thompson *v.* Railroad Co., 6 Wallace, 137; Robinson *v.* Campbell, 3 Wheaton, 212; McCullom *v.* Eager, 2 Howard, 64; Noonan *v.* Lee, 2 Black, 509; Bennett *v.* Butterworth, 11 Howard, 674; Payne *v.* Hook, 7 Wallace, 430.)

"Wherever a case in equity may arise and be determined, the same principles of equity must be applied to it." (Neves *v.* Scott, 13 Howard, 272.)

Tested by these decisions, it may well be questioned whether so much of the Montana statute as abolishes all distinction between cases at law and in equity, and requires issues of fact to be tried by a jury, is not inoperative and void. If valid, it was error to submit only part of the issues of fact to a jury. At all events, when a case comes here, this court will look to the subject-matter of the suit, and, if it be of an equitable character, will dispose of the case according to the principles and practice of the high Court of Chancery in England, as they have been modified by its rules. "The laws or practice of the Territory cannot regulate the process by which this court exercises its appellate power." (Brewster *v.* Wakefield, 22 Howard, 128.)

The subject-matter of this suit is clearly one of equitable jurisdiction, and if the proceedings have not been according to the principles and practice in equity, as established by this court, the decree must be reversed. The decree does not profess to be based upon evidence submitted to the chancellor, and contained in the record, but upon the verdict of nine of twelve jurors on part only of the issues involved in the case. Is any such proceeding known to the equity practice of the United States courts, or to the practice of chancery courts in England, from which our system of equity jurisprudence is mainly derived?

It was held by the Supreme Court of Montana that the territorial statute giving the same force and effect to a

verdict of three-fourths of a jury as if it were rendered by the whole jury was repugnant to Article 7 of the amendments to the Constitution of the United States, so far as it related to suits at common law, but that such a verdict was good in an equity proceeding. (Record, 120.)

That the terms, "trial by jury," in so far as they regarded the number of the jury, and the unanimity of the verdict, had a definite and specific meaning at the time the Constitution was adopted, cannot be doubted. "Verdict is the unanimous decision made by a jury." (Bac. Abg., Title, Verdict.)

"If the jurors do not all agree in a verdict, the verdict is bad." (Bac. Ab., Title, Verdict, letter F; 3 Bl. Com., 376; Parsons *v.* Bedford, 3 Peters, 433.)

It is beyond the power of the legislature of Montana, or Congress even, materially to change the character of a jury as it was understood at the time the Constitution was adopted. "The number of jurors cannot be diminished, or a verdict authorized short of a unanimous concurrence of all the jurors." (Wook *v.* The State of Ohio, 22 Ohio, 306.)

If this suit is to be treated as a proceeding at common law, it is manifest that to receive the agreement of three-fourths of the jurors and give it the effect of a verdict of the whole jury would be erroneous. It is, however, conceded that the subject-matter of this suit is of an equitable character; but the issues which were submitted to the jury were issues which, according to the course of the English Chancery practice as adopted by the Supreme Court, could only be tried in a court of law. In a court of chancery there is no jury, and when in the opinion of the chancellor matters of fact are involved in a suit which ought to be passed upon by a jury, the practice is to direct a feigned issue to be made up, and it is sent to a common law court for trial. On the trial of this issue in the common law court, questions of law in regard to the

admissibility of evidence and otherwise are raised and decided by the common law judge, and the case is proceeded with in the same manner as any other suit. (2 Daniels' Ch. Pr., 1085, and notes.)

The jury empanelled is a jury in a common law court; it is sworn to try an issue pending in that court, and the constitutional provision in regard to jury trials applies to it just as much as if the suit had not originated out of chancery. It was, doubtless, competent for the chancellor to have passed upon the facts of this case without the intervention of a jury, but if he sends them to a court of law to be determined by a jury, it must be to such a jury as the common law provides, and to refuse the motion for a new trial, and base a decree upon the verdict of nine jurors, three dissenting, was error.

It was decided by this court in Noonan *v.* Lee, (2 Black, 509,) "that the equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States. Their powers and rules of decision are the same in all the States. Their practice is regulated by themselves, and by rules established by the Supreme Court. This court is invested by law with authority to make such rules. In all these respects they are unaffected by State legislation;" and in the case of Orchard *v.* Hughes, (1 Wallace, 77,) it was held that a case coming from a territorial court was governed by the decision in the case of Noonan *v.* Lee. Treating this case as an equitable proceeding to be governed by the chancery practice as it prevails in the United States courts, unaffected by territorial legislation, and it is full of errors.

The bill or complaint is defective in not stating that executions were returned *nulla bona;* that the defendant in execution had no property liable to execution.

The allegation that executions were returned "*unsatisfied*" is not equivalent—*non constat* they may have been returned unsatisfied by direction of complainant, as was done in this very case by Duer. (Record, 28.)

The bill as to Duer is still further defective. Neither the bill nor Duer's petition to be made a party contains any allegation that he was a creditor of the Morses at the time of their conveyance to Dunphy. "This is decisive of the case" as to Duer. (Mattingly *v.* Nye, 8 Wallace, 370; Sexton *v.* Wheaton, 8 Wheaton, 229; 1 American Leading Cases, 1.)

2. The record contains no evidence to support the decree, which is based wholly on the finding of three-fourths of the jury on certain propositions which involved only part of the material issues between the parties. No such thing is known under the English Chancery practice as taking the finding of three-fourths of a jury and basing a decree upon it.

The questions of the existence of the indebtedness at the time of the conveyance to Dunphy, of the existence of the judgments, of the issuing of executions and their return unsatisfied, and many other facts material to the appellee's right to recover, were not submitted to the jury, nor were they established before the chancellor.

The record contains no order submitting anything to the jury, and the pleadings were not before them. As to the propositions passed upon by the jury, see Record, 81, 82, 83.

Dunphy, in his answer, denies the validity of the judgment of Kleinschmidt *v.* Morse, surviving partner, and alleges that the summons and sheriff's return thereon in said case were quashed, and the judgment subsequently entered by default, without any other service or appearance by Morse.

Kleinschmidt, in his replication, "denies that after quashing the summons in the case of T. H. Kleinschmidt against B. Morse, surviving partner of E. & B. Morse, on the 9th day of March, 1868, there was no other or further appearance ever entered by the said Morse." (Record, 23.)

The complainant having admittted the quashing of the summons and return, it was incumbent on him to prove the alleged subsequent service or appearance.

Dunphy's answer does not admit the existence of the indebtedness on which the judgment in favor of Kleinschmidt was entered, at the time of the execution of the conveyance to him by E. & B. Morse, nor the returns of executions unsatisfied, as alleged by Klienschmidt & Duer; and the record contains no proof on these subjects. "If the answer neither admits nor denies the allegations of the bill, they must be proved." (Young *v.* Grundy, 6 Cranch, 51.)

"All the testimony on which the judge founds his opinion should, in cases within the jurisdiction of this court, appear in the record." (Conn. *v.* Penn., 5 Wheaton, 424; Mayor of New Orleans *v.* United States, 5 Peters, 449.)

This court, in passing upon a creditor's bill, has said:

"In this case the bill alleges that executions were issued upon the judgments of the complainants, and were returned unsatisfied, but the allegation was not admitted, and no proof on the subject was produced at the hearing." * * * "That the suit cannot be maintained under these circumstances is clear, both upon principle and authority." (Jones *v.* Green, 1 Wallace, 330; Chittenden *v.* Brewster, 2 Wallace, 195; McElwain *v.* Willis, 9 Wendell, 548.)

In the case of a creditor's suit in Illinois, the supreme court of that State says:

"The record does not show an execution issued on the judgments and returned *nulla bona*. The answer admits the judgments, but denies all knowledge of the execution. The decree recites the execution, as admitted by the answer; but this is an error, as appears by reference to the answer. For this defect of proof, the decree reversed." (Heacock *v.* Durand, 42 Ill., 231.)

The decree in this case recites that "whereas execu-

tions issued upon said judgments were returned wholly unsatisfied," but contains no averment that it was proven, or so appeared to the court. The recital is nothing more than an assumption, without any evidence to support it. It must appear from the record that the court heard evidence, and found the facts to be true. (Wilhite *v.* Pearce, 47 Ill., 415.)

3. If this court should give the same effect to the agreement of three-fourths of the jury as if it had been the finding of the whole jury, on a feigned issue properly made up, then the appellant is entitled in this court to the benefit of his objections to the decisions of the court in the admission of evidence, and in the giving and refusing instructions, all of which were excepted to at the time, and preserved in the record, in accordance with the Montana Statutes, Civil Practice Act, §§ 165, 188, 189, 190, 191, 193, 194, 195; Organic Act, § 9; Record, 92. The motion for a new trial was submitted to the chancellor after the court had overruled the objections to the verdict, and brought before him all the decisions which had been made by the judge on the trial of the feigned issue. (Brocket *vs.* Brockett, 3 Howard, 691; McLaughlin *vs.* Bank of Potomac, 7 Howard, 220.)

4. It was error to admit in evidence the declarations of Elkana Morse, made after the sale to Dunphy, and not in his presence. (Record, 35.)

In a suit to set aside a sale alleged to be in fraud of vendor's creditors, the statements, either oral or written, made by the vendor after the sale, are incompetent evidence against the purchaser. (Clements *vs.* Moore, 6 Wallace, 299; Thompson *vs.* Bowman, 6 Wallace, 316; Myers *vs.* Kenzie, 26 Illinois, 36; Horrigan *vs.* Wright, 4 Allen, (Mass.,) 514; Jones *vs.* East Society, &c., 21 Barber, 174.)

The only evidence offered to the time of admission of the statements of Elkana Morse, (Record, 35,) was that

of persons who stated that they had settled accounts with Benajah Morse after January 3, 1868, and in every instance they did not know in what capacity he was acting, or else understood at the time that it was for Dunphy. This evidence had no tendency to prove collusion with Dunphy so as to make statements of Elkana Morse, made in 1867, admissible.

5. It was error to admit Kleinschmidt to testify to the existence and contents of a written instrument said to have been executed by Dunphy to E. & B. Morse, whereby he agreed to cancel the mortgage they had executed to him. (Record, 35.) The bill makes no reference to such a paper. Its existence was denied on oath by Dunphy. Oral evidence cannot be substituted for a written contract the existence of which is denied. (1 Greenleaf on Ev., § 88.)

No such paper was in issue between the parties; and if it had been, and its existence admitted, no proper foundation was laid for the introduction of parol proof of its contents. (Civil Practice Act, § 422.)

It was error to refuse the 11th, 12th, 13th and 14th instructions asked by appellant.

They were the following:

"11th. That the vendor cannot remain in the sole possession of the goods sold; but if it is apparent to the world that he has ceased to be owner, and that another has become such, and that the vendor is only subordinate or clerk, the rule requiring an actual and continued change of possession has been complied with.

"12th. After the sale of goods and chattels in good faith, and an actual and notorious change of possession, the employment of the vendor by the vendee in the capacity of salesman or clerk is not of itself conclusive evidence of fraud which admits of no explanation.

"13th. If the jury find from the evidence that B. Morse was retained in the employment of Dunphy as a clerk, aiding and assisting in settling up the old accounts, owing to his having full knowledge of the same and more

competent to settle the same, this would not impair the transfer.

"14th. If the plaintiffs rely upon the written agreement claimed by them to have been executed between E. & B. Morse & E. M. Dunphy, testified to by plaintiff Klienschmidt, then the execution of the instrument by Dunphy must be proven by a preponderance of evidence; and if the jury find that the weight of evidence is against the due execution thereof, then the jury will disregard the same." (Record, 79 and 80.)

6. It was error to instruct the jury that "if nine of the jury find from the evidence an answer to any proposition presented to you, you will return it as your finding." (Record. 80.)

7. It was error to refuse the motion for a new trial.

The chancellor will hear a motion for a new trial; and if the verdict is contrary to the *weight of evidence*, or if the jury is guilty of misconduct, or if testimony is improperly admitted, or if the judge has misdirected the jury, will grant a new trial. (2 Danl. Ch. Practice, 1292, 1307, 1311, 1312; 9 Richardson Eq. Rep., 271.)

No order was made directing a feigned issue, or the submission of any questions to the jury; and the whole proceeding before the jury being inconsistent with the rules of practice in chancery suits, must be treated as a nullity.

8. If the evidence contained in the record is to be examined, irrespective of the action of the jury, it fails to make out a case.

The record contains no proof of the existence of an indebtedness by E. & B. Morse at the date of their mortgage to Dunphy; no evidence of the filing of transcripts of the judgments in Gallatin county, nor of the return of executions unsatisfied; and excluding the declarations of E. & B. Morse made after the sale to Dunphy, which were incompetent, there is no sufficient evidence to overcome the sworn answers and testimony of Dunphy and Benajah

Morse denying all fraud, setting forth specifically the consideration and *bona-fides* of the mortgage and assignment, and of the transfer of the actual possession to Dunphy.

9. The decree itself is uncertain in rendering a joint judgment in favor of complainants, claiming different amounts and in different rights, and in directing the judgment to be credited by the amount in the hands of the receiver, without specifying what that amount is, and the record failing to show even that a receiver was ever appointed.

LYMAN TRUMBULL.

Of Counsel for Appellant.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1870.

E. M. DUNPHY, APPELLANT,

vs.

T. H. KLEINSCHMIDT AND E. C. DUER.

Reply to Brief of Hon. Lyman Trumbull.

The appellants, on this second appeal, for the first time urge deficiencies in the record, as follows:

1st. Want of proof of Kleinschmidt's judgment.

Answer.—The transcript of the judgment, rendered March 12, 1868, is in the record—(p. 5.) This is three days later than the quashing of the summons as stated. —(p. 18.)

2d. That the bill does not state that the executions were returned *nulla bona*, and that the defendant had no property liable to execution.

The bill does so state fully and clearly. Says:

P. 9, 33, 34. The execution was placed in the hands of the sheriff, and the officer returned it unsatisfied, "as appears by the execution and return thereon," which is made an exhibit and found p. 6. The return says: "This execution returned unsatisfied. No property found in

this county on which to levy." And the petition (p. 11–44) says plaintiff urged the sheriff to levy on the property, and he was deterred by the mortgage, and was forbidden by Dunphy, and "has returned the same unsatisfied, as above stated."—(See testimony of George, p. 48; Terrell, 48, 40; Moffitt, p. 49.)

But it is too late on the hearing to make an objection of this kind, which, if it exists, should be demurred to.—(1 Dan. Ch. Pr., 579, 3 Am. ed. of 1865; Mitf. Eq., 107–108; 4 J. Ch., 287; 2 id., 369; 2 Paige Ch., 509.)

The 3d defect urged is that it is not shown that the Morses' indebtedness sued on existed at the time the mortgage was made.—(Appellant's brief, p. 16.)

The bill alleges, (pp. 10, 38,) that at the time of the execution of the mortgage, the Morses were indebted to sundry persons, and amongst others on the very account on which the Kleinschmidt judgment was rendered, then belonging to Erfort & Petering, of St. Louis. The amount of debts there charged is $39,000, and Duer's $15,410 more, made a total of $54,410.

There is no denial in the answer of the existence of such indebtedness when the mortgage was executed. Kleinschmidt's testimony (p. 36) shows the existence of this debt before the execution of the mortgage.

4th. The judgment of Duer, as alleged in his bill to exist, in the same court, namely, for $15,410, on 12th March, 1868, (p. 25,) and the execution issued thereon, is distinctly admitted in the answer, (p. 26,) and a defence of lis pendens is set up. No other defence is made to Duer's bill.—(p. 27.)

5th. This mortgage is attacked because it is a *fraud*, and by the statute of 13th Elizabeth "gifts of goods and chattels, as well as of lands, by writing, or otherwise, made with the intent to delay, hinder, and defraud *creditors*, were rendered void as against the person to such fraud would be prejudicial."—(2 Kent. Com., 440.)

This statute is simply declaratory of the common law,

(see 1 Story Eq., sec. 352, citing Hamilton vs. Russel, 1 Cranch, 309,) and in force in Montana.—(13 U. S. Statutes, 88, sec. 9.)

This proceeding is not to remove an incumbrance in aid of the enforcement of the *legal* rights of the creditors, which would be a ancillary proceeding, but it is a bill appealing to the exercise of the *original* jurisdiction of a court of equity on the grounds of *fraud*.

See Hagan vs. Walker, 14 How., 29, 30, where the court say: "The argument is that the jurisdiction of a court of equity, to aid a judgment-creditor by removing a fraudulent incumbrance on the property of his debtor, is ancillary *merely*, * * and that the creditor must have exhausted his legal remedy by a return of *nulla bona* on his execution," &c. And the court deny that this is the only ground of jurisdiction, and say, in case of fraud, it "comes under the head of original jurisdiction in equity." This was a bill to set aside a fraudulent deed by a creditor.

In Jones vs. Green, (1 Wall., 330,) cited by appellant, the proceeding in equity was "to subject certain property to the satisfaction of the judgments," and so merely ancillary.

And in Chittenden vs. Brewster (2 Wall., 195) the bill was merely to remove a fraudulent incumbrance from the existing property; but in the case at bar direct injury to the creditors is alleged against Dunphy by means of his fraudulent acquisition and disposition of the property.

1 Story Eq., sec. 68, says: "And cases of fraud are, least of all, those in which complete exercise of the jurisdiction of a court of equity, in granting relief, ought to be *questioned or controlled*, since, in addition to all other reasons, fraud constitutes the most ancient foundation of its power, and equity sifts the conscience, * * and compelling the party to do equity, as it shall appear upon a full survey of the whole transaction."

In Jones vs. Bolles (9 Wall., 369) the court say: "It is objected that a court of equity has no jurisdiction of

the case, because the law affords a complete remedy in damages. This objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation, and concealment."—(See, also, Shelton vs. Tiffin, 6 How., 163, 185.)

In Hubbard vs. Turner, (2 McLean, 516,539,) where there was a mortgage for $90,000, and an actual debt of only $4,000, it was held fraudulent, and that the removal of this instrument was ground for original exercise of equity jurisdiction.—(1 Story Eq., sec. 369. See, also, Burnley vs. Jeffersonville, 3 McLean, 336.)

The same facts which would be shown by a return of *nulla bona* are abundantly established by the testimony of witnesses, and this objection becomes merely technical.

In Day vs. Washburn, (24 How., 352,) a creditor's bill to set aside fraudulent deed, the court say: "The proceedings in this case have not been conducted with much regularity," &c. Still the decree below was affirmed.

2d. In case of actual fraud a deed is set aside as to subsequent as well as existing creditors.—(Parkman vs. Wells, 19 Pick., 231, 237; 1 Story Eq., 361, 369, 352; 2 Kent Com., 442.)

The Montana statute provides that "no mortgage on personal property shall be valid against the rights and interests of *any third person*, unless possession shall be delivered to the mortgagee."—(Montana Code, p. 339, sec. 1.)

It is further provided, if the mortgage is *bona fide*, the possession may remain with the mortgagor, provided it shall so stipulate, and be recorded.

There is another statute, p. 495, sec. 18, which says "every conveyance in writing, or otherwise, of any estate or interest in lands or goods in action, &c., made with the intent to hinder, delay, or defraud *creditors or other persons* of their lawful suits, damages, forfeitures, debts, or demands, * or judgments, suffered with the like

intent, as *against the person* hindered, delayed, or defrauded, *shall be void.*"

The following facts appear from Dunphy's answer and testimony:

The mortgage was executed October 31, 1867, and the modification of it January 3, 1868, at which time Dunphy's possession should have begun. The bill was filed April 30th, and Dunphy's answer sworn to 12th May and filed June 22, 1868, (p. 14,) in which he admits that "he has sold a portion of the property, and has received on his note, *on account of said sales*, above the *expenses*, about $16,000, which should be credited on said note," (p. 61;) that "he did take possession of the goods *then* (January 3d) in the store, and amounted to $4,649.01, and also of 158 head of cattle, upwards of 70 of which he says were sold by the sheriff on execution of Herron vs. Morse, (leaving to Dunphy only 88 cattle,) and also received 501 sacks of flour, $121 in fixtures, and one-half the threshing-machine." He adds, on the 30th April, "there was not to exceed the amount of $1,000 of goods in the store which were at any time owned by the Morses."—(p. 64,)

His sales were—

88 head of cattle, at $63.50	$5,588 00
Remaining goods	4,649 01
501 sacks of flour	5,010 00
Threshing-machine, say	1,200 00
	$16,437 01

He says "a large amount of the stock included in the mortgage strayed away."—(p. 66.) But, excluding this stock and excluding the notes and accounts of "the property which he has reduced to possession, *he will be able to make himself good*, or to collect therefrom the amount actually due him from said Morse." Thus his debt was reduced in six months to less than half, say to

$14,000; and, as $7,500 of it was interest not earned, by deducting one-half of that, it is reduced to ~~$7,650.~~ $10250

The trial began 15th March, 1869, (p. 29,) and p. 57 is Dunphy's testimony. In which he says "I received 153 head of cattle in all"—it was 158 before—and admits the sale of only 131. He denies receiving over 300 sacks of flour—it was 501 before.—(pp. 58, 224.) I took possession of the store January 3d, and "the *exact* value of the goods in store was $5,800"—before it was $4,649.01. The expenses of selling $19,000 worth of property was $3,000, and yet he paid Morse only $75.00.

And he repeats, "I could scarcely have realized more than sufficient out of all the goods and property received from the Morses to pay my note."

On page 17 he says he had, in May, about $16,000 of goods in store, not received from the Morses; and pp. 58, 262, says "I ordered removed some of the goods after January 3d, under advice of counsel, to keep them out of the way of execution against the Morses."

$10250

Having reduced the debt to ~~$7,650,~~ and admitting possession of ample property to pay what was due him, *exclusive of cattle and accounts*, as shown by the answer; by his testimony (p. 58) we find he is chargeable with $19,000 *more* money received for sales, than that admitted on p. 17, where he enumerates the property which had yielded him then $16,437$\frac{1}{100}$.

The account on p. 58 excludes the goods in the store, threshing machine, and flour, and embraces mules, wagons, book accounts and notes, and 131 head of cattle, amounting to $8,337.

The whole sales of the property, on p. 58, are not set out, and foot up only $13,467$\frac{50}{100}$. He has omitted 22 cattle of the 153, that he acknowledged, which amount to $1,397, and has omitted other cash amounts for reasons not explained, and leaves it to be imagined which property produced the difference between $13,467.50 and $19,000, the gross sum admitted.

The total sales admitted by him on pp. 16 and 58 are $35,437, and in this he admits only $13,925 for cattle, when the proof shows him chargeable with at least $17,000, being $3,075 additional. He admits of 501 sacks of flour, (p. 17,) and is chargeable with 499 more, $4,990. He admits notes and accounts $4,600, and is chargeable with $5,400 more. These additional sums amount to $23,816, which, with $35,437, admitted by him, amount to $59,253.

To this may be added the profit on the goods in the store, and sundry other items, such as horses, colts, 8 mules, wagons, 100 tons hay and other crops, a reaper and mower, 6 houses at Summit City, the store building and lot, the farm, and buildings.

It is to be remembered that (p. 16) Dunphy admitted enough property to pay the balance of his debt, excluding all cattle over 88, and also excluding the book accounts and notes.

F. A. DICK,

April, 1871. *Of Counsel for Appellees.*

In the Supreme Court of the U. S.

DECEMBER TERM, 1870.

ELIJAH M. DUNPHY, Appellant.

vs.

T. H. KLEINSCHMIDT and CHARLES E. DUER, Respondents

Brief of ALEX. M. WOOLFOLK, of Counsel for Respondents, with J. O. BROADHEAD and F. A. DICK.

Supreme Court of the United States.

E. M. DUNPHY, *Appellant*,

vs.

T. H. KLEINSCHMIDT AND CHAS. E. DUER, *Respondents.*

No. 148.

STATEMENT.

On the 8th day of June, A. D., 1868, T. H. Kleinschmidt filed his amended creditors bill in the first Judicial District Court of Montana Territory against B. Morse, surviving partner of E. & B. Morse and E. M. Dunphy, (record p. 8,) and Charles E. Duer was afterwards admitted as a co-plaintiff on his petition.

The object of this bill was to set aside as fraudulent a certain Mortgage for $30,000 executed by E. & B. Morse to Dunphy, to subject the property embraced therein, still remaining, to the payment of Plaintiff's debt, and also if the residue of the property, still unconverted, failed to pay the debt, to subject Dunphy to personal liability on the ground that the greater part of the property embraced in the fraudulent Mortgage had been reduced to possession and converted by him, thereby defeating the collection of Plaintiff's demands.

Dunphy and Benajah Morse, both filed answers, but afterwards before the trial, the Attorneys of Morse being also Dunphy's Attorneys, withdrew all further appearance for him—(record, p. 29).

On the trial the case of the plaintiffs was, that at the date of the execution of the Mortgage, Oct. 31st, 1867, E. & B. Morse really owed Dunphy only one thousand sacks of flour, which they were to deliver by January 1st, 1868, or else pay $10,00 for every sack they failed to deliver by that time—that the note and and Mortgage for thirty thousand dollars consequently represented a fictitious indebtedness, and was simply designed to cover up the property of the Morses and defraud their credi tors.

Dunphy admits that his first trade with the Morses was a le

of goods for a thousand sacks of flour, but claims that before the Mortgage was executed the flour contract was abandoned, and that he advanced them ten thousand dollars in money besides the goods and took the Mortgage to secure the whole. (Record, p. 57-58). The parties went to trial upon this issue, as to whether the true indebtedness, at the time of the execution of the Mortgage, was thirty thousand dollars payable one year after date, or only one thousand sacks of flour, to be delivered by January 1st, 1868.

The Chancellor submitted special issues to the jury and directed that nine of them might find the answer to any proposition submitted. This direction was in conformity with the jury law of Montana.

The jury found all the issues submitted in favor of Plaintiffs, which findings were approved by the Chancellor, who based his decree thereon. From this the Defendant, Dunphy, appealed.

This is clearly a Chancery case. It comes to this court as such, by appeal, instead of by writ of error. The Plaintiffs came into a court of Equity to obtain relief against a fraudulent Mortgage which had defeated their executions at law.

It has long been a well established doctrine in this court, that the equity practice in the courts of the United States is not controled by the State Practice, but "is regulated by the laws of Congress and the rules of this court, made under the authority of an act of Congress; and one of those rules is, that when not otherwise directed the practice in the high court of Chancery in England shall be followed."

Bein et. al. vs. Heath, 12th Howard, p. 168.

Story vs. Livingston, 13th Peters, 359.

Noonan vs. Lee, 2nd Black 499.

Boyle vs. Zacharie, et. al., 6th Peters 648.

The only question is, whether this applies to Equity cases arising in the courts organized in the Territories. In Orchard vs. Hughes, 1st Wallace, 73, which arose in the Territory of Nebraska, Justice Nelson who delivered the opinion of the court used the following language: "It was held by this court in the case of Noonan vs. Lee," that "the equity courts of the United States under the Constitution are governed by the practice of the Court of Chancery in England, modified by the acts of Congress and the rules of the Supreme Court."

"The decree in the present case was rendered in a Territorial court, and it has been contended that this court is not a court under the constitution, nor organized under the Judicial act of 1789, but by the Legislature of the Territory under the or-

ganic law, and therefore that the decision in the case of Noonan vs. Lee does not apply. Of this opinion are Messrs. Justices Swayne, Field and myself. But a majority of the court are of the opinion that the case is governed by the previous one."

Under these decisions then, the Territorial law, regulating the practice of the courts in Montana, will not be considered in determining this appeal, but it will be tried by the rules governing chancery practice in this court.

The appellant must rely for success upon the equities presented by the record, and it devolves upon him to show by that record, that he has substantial equities which were overlooked by the Chancellor below.

The record shows that the appellant has at least no cause of complaint at the action of the court in excluding any testimony offered by him. His testimony was all received. The fullest and freest investigation was accorded him. Yet after it all, the findings of the jury were against him, and were approved by the Chancellor, (record 83).

The case was again fully considered on appeal to the Supreme Court of Montana and the decree of the court below was affirmed. This is the third trial which is allowed the appellant, and it is conceived that a full examination of the record will but lead to the same result as in the courts below.

The circumstances connected with this transaction between the Morses and Dunphy, combine with the acts and declarations of the parties in shedding light upon its true character.

FRAUD AS EVIDENCED BY CIRCUMSTANCES.

It is admitted by the pleadings that at the date of the execution of the mortgage to Dunphy, the Morses were indebted to Erfort & Petring, Appleton, Noyes & Co., and William Young & Co., of St. Louis, in the sum of thirty-one thousand dollars, and to William Herron, in the sum of eight thousand dollars, besides other indebtedness. The judgments of plaintiffs alone amounted to over thirty-two thousand dollars.

It is also admitted by the pleadings, and was established on the trial, that the property embraced in the mortgage to Dunphy, was of the value of seventy thousand dollars. This, too, was all personal property, except a ranche and store-house, worth about three thousand dollars. (Record page 50.)

Yet the mortgage provided that Morse should remain in possession of, and "carefully use," for one year this entire property, consisting of hay, store goods, wheat, flour, crops, &c., when to use could mean nothing but to consume them. The larger por-

tion of the property embraced in the mortgage would in the natural course of things be consumed or disposed of before the expiration of the year. Yet the instrument made no provision for the application of the proceeds to the payment of Dunphy. The mortgage, consequently served but to cover the property, like a shield, keeping off creditors, while under its protection, the Morses could convert the whole into money without danger of molestation.

The parties act throughout as if the mortgage was designed for the protection of the Morses, instead of Dunphy. It is left with them after its execution. Dunphy sends it down for record by them to Gallatin county, a distance of seventy miles, although he could have sent it by Anders, his own clerk, who went down with them. (Testimony of Anders and Kratzer.)

It seems, also, from the testimony of James Lemon, that the propriety of sending down the mortgage by the Morses, was a subject to which Dunphy's attention had been attracted, and upon which he consulted with William Chumassero, his legal adviser. He does not wish to know whether he can trust the Morses. He manifests no hesitation on that score. But, as in every made up case, his attention is wholly called to appearances, and he wants to know simply the legal effect of such conduct.

There is something strange, too, in the continued silence of Mr. Chumassero, who seems not only to have been the adviser of the parties, but a witness to the entire transaction.

But there were other persons whose opportunities for knowing the fairness or fraud of this entire transaction, were greater even than those of Mr. Chumassero, who also have maintained an unbroken silence. It appears from the record that Sill and Seagrass were clerks and employees of E. & B. Morse before this transaction with Dunphy, and remained so long afterwards. Dunphy testifies that after the 3d of January, 1868, they were both hired by him. Certain, it is, that even as late as the 4th of May Sill was in the store, selling goods, collecting accounts, carrying the safe key. and making himself generally useful. (Testimony of Moffitt, Ledbeter, Kratzer, Weddell, et al.) Dunphy acknowledges that through the advice of Chumassero & May, his attorneys, he even employed Sill to conceal a portion of the Morse goods, "and keep them out of the way of execution against the Morses."

From his intimate relations with both Dunphy and Morse, Sill must have known the true character of the transactions between them. Concealment from him would have been impossible. If they were not frudulent, they could have found no witness more important. Yet, although the names of Sill and

Seagrass appear conspicuously throughout the record, as identified with the entire transaction in all its various details, they have both remained in the background.

Sill and Morse seem to have left the territory about the same time, shortly after this bill was filed, and Seagrass is never accounted for at all. (Testimony of Moffitt and Weddell. Record, 49-50.)

It was strange, too, that Morse's himself should have left at such a time, just before the first trial of this case, in June, 1868. (Record, page 29.)

It was also strange, that his attorneys, who were also Dunphy's attorneys, after having filed his answer, should afterwards, just before the trial, deliberately withdraw it, and thus confess as against him, the charges of the bill to be true.

But stranger than the absence of Morse, than the confession of his fraud, or the silence of his most material witnesses, is the mysterious disappearance of the property embraced in the mortgage. It was admitted by the pleadings and not disputed at the trial, that the property embraced in the mortgage, on the 31st of October, 1867, was worth seventy thousand dollars. Dunphy claims also to have furnished the Morses at that date, goods and money to the amount of $22,500, making in all $92,500 in money and property,then owned by the Morses, according to Dunphy's estimate, or $80,000 according to the estimate of plaintiffs. At the end of two months, on the 3d day of January, 1868, Morse having paid none of his creditors, turns over everything to Dunphy by a written modification of the mortgage. Yet Dunphy claims still to be unpaid, and to have received hardly sufficient for the payment of his debt; while Morse testifies as Dunphy's witness, that he is poor, and only had enough when he left Montana to take him out of the territory respectably.

It is certainly strange that this entire property, which it is acknowledged was concealed from the officers of the law, should suddenly disappear within two months, leaving Morse a pauper and all his debts unpaid.

As to what became of this property—whether the mortgage enabled Morse to make way with it, or Dunphy to convert and appropriate it, it is now immaterial to inquire. The jury found that Dunphy had reduced to his actual possession more than fifty thousand dollars worth of this property, and the admissions of Dunphy,taken in connection with the other evidence,disclosed by the record, shows that this estimate is exceedingly reasonable.

The whole case of Dunphy consisted in the attempt to show

his advance of ten thousand dollars to the Morses in addition to the goods furnished. In his testimony, he bases the recission of the flour contract upon this advance of money. It is by means of this advance, together with its enormous interest of five per cent. per month, that he attempts to figure out the consideration mentioned in the Mortgage.

We might reasonably expect, under the circumstances, that the most conclusive proof would be offered of the counting and handing over of this much money to the Morses. But even to this fact there was no evidence besides the testimony of Dunphy and Morse, Lemon did not know the amount in the package, and Lebeter, a member of Dunphy's family, simply saw them counting the money, but did not count it himself.

Although too, the defence were challenged to account for this money they never attempted to do so. Even Morse in his deposition makes no attempt to account for it. This deposition too was taken after there had been one trial of the case, and when the defence must have felt the necessity of showing what had become of it. In fact Dunphy swears in his affidavit (record p. 84) that he had "made diligent search and inquiry to ascertain what the said Morses had done with said money, but was unable to ascertain to whom any of said money was paid," Yet his attorneys in prosecuting this "diligent inquiry" carefully avoid interrogating Morse himself upon that question in taking his deposition. He was certainly the most proper person to have applied to for information on that subject.

But Dunphy claims in his affidavit, after nearly a year's search, to have just ascertained that large amounts of money were paid by the Morses to Dr. Lamme and A. Hanaur. Yet neither the affidavit of Lamme nor Hanaur is produced to that effect, and his statement as to Lamme is flatly contradicted by the affidavits of Herron and George.

Dunphy too claims to have paid this money on the 31st of October. The Morses immediately afterwards started for their home in Gallatin county, which they reached on the 2nd of November. Yet on the 4th of November they were both dunned for a small bill by Mr. Buchar and had to borrow the money to pay him. (Testimony of Buchar and Terrill.)

It was proved also by Mr. Anders, Dunphy's clerk, that the flour contract was consummated the evening before or the morning the Morses left Helena for Gallatin county. This was after the Mortgage had been executed, and several days after Dunphy claims that the flour contract had been abandoned.

It seems too that Dunphy was a merchant.

He has a store in Helena, out of which he sells these goods to

the Morses, and it appears that he kept two clerks in his employment, Mr. Anders and Ledbeter, (testimony of Anders and Ledbeter). It is to be presumed that a transaction of this magnitude would be evidenced by some entry upon his books. But although such entries would not only have been competent but important evidence, no books were produced on the trial, nor was their absence accounted for.

Another important circumstance in this case is the fact that there was no change of possession of the property embraced in the Mortgage after Jan. 3d, 1868. The modification of the Mortgage executed on the 3d of January purported to turn over the possession of the entire mortgaged property to Dunphy. This was acknowledged and recorded. This modification did away with that provision in the Mortgage, giving the Morses the right to remain in possession for one year. It was only by virtue of this provision that they could legally remain in possession at all. Laws of Montana (1864), p. 339, sec. 1 and 3; also p. 494, sec. 15.

After this modification, then, it became necessary for Dunphy to take immediate possession of everything in conformity with its terms. Otherwise the Mortgage became void as to creditors.

But it was proved by numerous witnesses that Morse continued to remain in possession and exercise ownership and control after the 3d of January, and even as late as the 4th of May; that he collected accounts and gave receipts, sold goods—traded—carried the safe key, and in fact did everything that an owner would do in the premises.

Surrounded as this transaction was with all these badges of fraud, the testimony of Kleinschmidt to the existence of a private agreement between Dunphy and the Morses to cancel the Mortgage whenever the Morses desired it, would hardly excite surprise. Kleinschmidt testifies that he recognized Dumphy's signature to this agreement; that he was familiar with his signature, having paid out money upon his checks in his capacity of Cashier of the first National Bank of Helena.

BUT THE ACTS AND DECLARATIONS OF THE PARTIES are even more conclusive against them.

It seems that about the time the Mortgage was first executed, the parties were less guarded than they afterwards became. Doubtless Dunphy felt indifferent about the matter at that time, as he was simply playing the part of a large creditor for the accommodation of the Morses, and perhaps thought that nothing would ever result from it. He tells Herron, after the Morses had left Helena on October 31st, that he had sold them a bill of goods for one thousand sacks of flour, to be delivered to him

in Helena on the first day of January, 1868, or else they were to pay him ten dollars for every sack they failed to deliver by that time. About the 20th of December at Bozeman he tells George that the Mortgage was for ten thousand dollars worth of goods to be paid in flour. This was before any suits had been instituted, (record 78).

The Morses too at first were perhaps prompted to make the Mortgage chiefly by their desire to defeat Hamilton and Herron in the collection of their demands. It seems that a lawsuit had existed between them, in which Hamilton and Herron had recovered a judgment on the day this mortgage was executed, (record 77). Morse tells Kleinschmidt that the object of the Mortgage was to defeat Hamilton and Herron, and intimated the same thing to Terrill, Deputy Sheriff of Gallatin county. It is probable that the purpose to defraud all their other creditors by the Mortgage had not been fully matured until sometime after its execution—perhaps not until the death of Elkana Morse.

At all events, shortly after the execution of the Mortgage they spoke freely to various persons in regard to the true character of their transaction with Dunphy. When the court admitted in evidence the declarations of the Morses on the ground that sufficient evidence of collusion had been established, it was further proved that immediately after the execution of the Mortgage they returned to Gallatin county and stated to divers persons that they owed Dunphy one thousand sacks of flour to be delivered by January 1st, 1868, (testimony of Grannis, Kirkendall, Wilson, Weddell, Hennemeway and Fredericks). On their way down to Gallatin from Helena, their own friend and witness, Kratzer, is forced to admit that "they talked all the way down about the flour contract with Dunphy and about getting the flour to Helena to fill it."

He also testifies that he knew nothing about this flour contract being done away with, and also further says "the Morses boarded with me, and I was very intimate with them, and familiar with their private business." Anders, too, who went down with them from Helena, testifies to the same effect.

We find also that immediately on their return to Gallatin county they contracted with the mills there to grind wheat to deliver this flour, (testimony of Grannis, Wilson, Fredericks and Penwell), that they contracted with teamsters to deliver this flour by Janauary 1st, 1868, (testimony of Kirkendall), and that they actually delivered between seven and eight hundred sacks of this flour to the knowledge of Plaintiff's witnesses, (testimony of Grannis, Vivion, Anceny and Penwell).

Yet in the face of this evidence Dunphy claimed that the flour contract had been abandoned at the time of the execution of the Mortgage, and that nothing was due him until October, 1868, although the Morses were busy sending him flour during the fall and winter of 1867. It is impossible to reconcile the Mort gage with the declarations and especially the acts of the parties.

The record shows, too, that Morse occasionally intimated to his friends, after legal proceedings had been instituted, that confidential relations existed between himself and Dunphy. He tells Kirkendall that "he had to trust to some person and Dunphy had never gone back on him yet." He tells Wilson also, in response to his suggestion that he was taking desperate chances in the way he was doing his business," that "he was bound to have a friend; that he must trust somebody." He also intimates to Mrs. Vantilburg that his own prosperity was greatly dependant upon Dunphy's success in this suit. The fact also that he leaves the Territory, and trusts his entire affairs to the management of Dunphy, is itself a strong proof of their confidentail relations.

In view then of the circumstances of this case, together with the acts and declarations of the parties, it is conceived that the Chancellor was well justified in decreeing the Mortgage to be fraudulent.

It was also clearly proved that this fraudulent mortgage had defeated the collection of plaintiffs' judgments. Mr. Terrill and Mr. Moffitt, who were Deputy Sheriff's of Gallatin county, both testify to this fact, and their testimony is not contradicted.

When the Chancellor then approved findings to the effect, that the Mortgage to Dunphy was fraudulent, that this Mortgage had defeated the collection of Plaintiffs' judgments, and that Dunphy had reduced to possession and converted more than fifty thousand dollars worth of the Mortgaged property, these findings clearly made Dunphy liable to the judgment creditors whose executions he had defeated.

Had the property embraced in the Mortgage been unconverted there would have been nothing required, but for the Chancellor to set aside the fraudulent Mortgage, and subject the property to Plaintiffs' executions. But when the fraudulent grantee had converted all or nearly all the property, equity could not stop with simply setting aside the Mortgage. Having acquired jurisdiction for this purpose, it properly retained it for the purpose of administering complete relief and doing full justice between the parties.

In Tayloe vs. Merchant's Fire Ins. Co., 9 Howard, S. C. p. 390, which was a bill to recover on a policy of Insurance which the

ompany refused to issue, Justice Nelson in delivering the opinion of the court said: "The party had a right to resort to a court of equity to compel the delivery of the policy, and being properly in that court after the loss happened, it is according to the established course of proceeding in order to avoid delay and expense to parties to proceed to give such final relief as the circumstances of the case demand," and the court lays down the rule "that having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties where it could as well be done in that court as in proceedings at law."

So, in this case the court having acquired jurisdiction for the necessary purpose of setting aside a fraudulent mortgage, properly proceeded in conformity with the prayer of the bill to render judgment against the fraudulent mortgagee for the amount of Plaintiff's demands, the collection of which had been defeated by his mortgage.

Swinford vs. Rogers, 23d Cal., 233.
Jones vs. Henry et. al. 3d Littell, 428.
Warford vs. Cameron, 3d Bibb, 434.
Armstrong et, al. vs. Gilchrist, 2nd Johnsons cases, 424.
Hendricks vs. Robinson et. al., 2nd John ch. Rep., 283.
Ludlows heirs vs. Kidd's executors, 4th Howard, 244.
1st Story Eq. Jur. sec. 65-68-71.

The record shows that a motion for new trial was made in the court below. It was based upon certain errors alledged to have been committed by the Chancellor, and to which it is claimed that exceptions were duly taken. This motion for new trial, and the grounds therein relied upon, are based upon the requirements of the practice act of Montana. The motion itself is made in conformity with the provisions of this practice act, under which law and equity are blended.

If the exceptions relied upon in the motion are determined by the rules governing equity practice, the mass of them would doubtless be regarded as technical and frivolous. But even if tried by the requirements of the practice act of Montana, we think that a brief review of the grounds relied upon in the motion will show that it cannot prevail.

The first exception sought to be saved by Defendant, and relied upon in the motion for new trial, was that the court erred in permitting witness Kleinsemidt to testify as to the contents of a certain instrument of writing executed by Dunphy to E. & B. Morse, (record p. 35).

It will be observed that the exception taken is not on the ground that no proper foundation had been laid for the intro-

duction of secondary evidence as to the contents of the instrument, but simply on the ground that the execution and existence of the instrument were denied, and that consequently its contents could not be proved by parol.

All the authorities agree that a party is confined to the point of the exception taken.

Hind's Lessee vs. Longworth, 11th Wheaton p. 199.

Moore vs. Bank of the Metropolis, 13th Peters, 302.

The exception as taken is clearly frivolous. If there is anything in the exception, then Dunphy and Morse by simply denying the execution and existence of the instrument, might exclude one hundred witnesses, as well as one, from testifying as to its contents. It is for the very reason that the execution and existence of the instrument are disputed that secondary evidence is required at all.

Outside of this point the exception is general, and a general exception cannot be made special for the first time in the Supreme Court.

Camden vs. Doremus et. al. 3d Howard, p. 515.

In the case of Camden vs. Doremus et. al., Justice Daniels who delivered the opinion of the court used the following language: "Upon the offer of testimony oral or written extended and complicated as it may often prove, it could not be expected upon the mere suggestion of an exception, which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court could explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view."

"It would be more extraordinary still, if under the mask of such an objection or mere hint at objection a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on, and which if they had been openly and specifically alledged might have been easily cured."

But the court committed no error in allowing the witness to testify as to the contents of the writing after notice to produce the original had been served upon Dunphy and the attorneys of B. Morse. The record shows too that B. Morse after the withdrawal of his appearance was interrogated concerning the instrument (see deposition of Morse, interrogatory 9th). The *whole* record must be considered in passing on this question, and it shows that every means known to the law had been exhausted to obtain the original instrument, and parol evidence of its contents was consequently proper.

Hayden vs. Palmer, 2nd Hill. N. Y., p. 205.

As to the 2nd exception, the court did not err in admitting the declarations of the Morses in evidence against Dunphy. Such declarations were not admitted until evidence had been introduced, showing collusion between Dunphy and the Morses to defraud the creditors of the latter, and until proof had been made that the Morses remained in possession of the property mortgaged to Dunphy and exercised ownership and control over it, after the period when they claimed to have delivered the possession thereof to Dunphy.

The courts have uniformly held that the retention of possession by the grantor under such circumstances is sufficient evidence of fraud and collusion to justify the admission of his declarations in evidence against the grantee.

The question of when a foundation had been laid for the admission of such evidence, was one of discretion for the Chancellor below, and the verdict of the jury on the question of collusion, and the continued possession of the Morses, show that the discretion was properly exercised.

Adams vs. Davidson et. al., 6th Selden 319.

Oldham and Kerr vs. Bently, 6th B. Monroe 428.

Ewing vs. Grey, 12th Ind. 64.

Cuyler vs. McCartney, 31st Barbour, 165.

Hocker vs. Gentry, 3d Metcalf, (Ky.,) 463.

Wiggins vs. Leonard, 9th Iowa 194.

Grant vs. Lewis, 14th Wisconsin 487.

The third exception sought to be saved by Defendant was to the charge of the court to the jury, (record, p. 80).

It will be observed that Defendant's attorneys simply filed the following statement as an exception:

"Kleinschmidt et. al. vs. Dunphy et. al.

The Defendant excepts to the decision of the court in refusing the instructions offered by Defendant and its charge to the jury.

Chadwick, Shober and Word, Defendant's attorneys."

The affidavits of Messrs. Arick, Chadwick and Shober, Defendant's attorneys show that this was simply filed with the clerk, (record, p. 89-90), and it does not appear that the objection was made known to the court.

On the contrary it appears from the affidavits on file that that portion of the charge directing that nine jurors might return a verdict met with the cordial approval of defendant's attorneys. (Affidavits of Thoroughman, Toole, Mayhew, Curtis and Secord, record, p. 89-91-92.)

But certainly such an exception as the above, simply filed with the clerk, does not conform to the requirements of the Practice Act. Montana Practice Act, sec. 188-9, provides only three mode

for taking exceptions, viz: to deliver in writing to the Judge, to require the clerk to write it down, or to have the exception entered in the Judge's Minutes and afterwards settled in a statement of the case. There is no provision for simply filing a statement with the clerk, and such statement being without the sanction of law, cannot avail as an exception in an appellate court.

Young vs. Martin, 8th Wallace, p. 354.

If such an exception as the above would be entertained, then any party might gamble for a verdict under a charge, perhaps in part prompted by himself, and yet avail himself of objections secretly filed with the clerk to be used in case of necessity.

The exception, too, is in general terms to the whole charge of the court. Montana Practice Act, sec. 189 requires that "the point of the exception shall be particularly stated."

It is well settled that exceptions made to the whole charge of the court, without pointing out any specific part of it excepted to, will not be regarded by the Supreme Court, if any portion of the charge is correct.

Rogers vs. the Marshal, 1st Wallace 644.

Harvey vs. Tyler, 2nd Wallace 328.

Johnson vs. Jones, 1st Black 220.

Hicks vs. Coleman et. al. 25th Cal. 146.

Jones vs. Osgood, 2nd Selden 234.

Hunt vs. Maybee, 3d Selden 266.

The charge presented several distinct propositions of law, and the correctness of the greater part of them would doubtless be conceded. The jury were charged that "mere words will not constitute a change of possession;" that it must be "evidenced by acts;" that "the jury are the judges of the facts and of the credibility of the witnesses;" that "when the jury find by a preponderance of testimony the answer to any question they will so find," which taken in connection with the foregoing, as to the credibility of the witnesses, presented the law fairly to the jury.

Ford vs. Chambers, 19th Cal. 143.

The only remaining proposition contained in the charge, was that nine of the jury could find the answer to any proposition presented.

This part of the charge was in conformity with the laws of Montana Territory.

Laws of Montana, (1869) p. 66, sec 15.

While the defendants might have raised the question of the constitutionality of this law, by proper exceptions to this part of the charge, yet by failure to do so, all objections were waived.

Lee vs. Tillotson, 24th Wendell, p. 337.

In the case of Mellott vs. Mayford, 1st Wisconsin, p. 401, the court held that

"To be in an attitude to take exceptions to the law providing for a jury of six in the county court, the party must show affirmatively that he objected to a trial by such jury."

There is certainly nothing in the exception taken, or in the affidavits accompanying the record, to show that the defendants objected to this portion of the charge. As the jury, too, were empannelled under this law, the defendants had ample time to prepare a direct and specific objection thereto, had they been so disposed.

But independent of this question, no valid exception could have been taken to this portion of the charge. This law of Montana was not inconsistent with the Organic Act of the territory or Constitution of the United States. By section 6 of the act organizing Montana Territory, the legislative power is extended "to all rightful subjects of legislation consistent with the Constitution of the United States." Section 13 of the Organic Act provides "that the constitution and all laws of the United States, which are not locally inapplicable, shall have the *same* force and effect within said Territory of Montana, as *elsewhere* in the United States."

Congress, by these provisions, has conferred upon the territory the same power to legislate within its own limits as a state, and subjected it to the same constitutional restrictions.

It will doubtless be conceded that the 6th and 7th amendments to the Constitution of the United States relative to trial by jury are not restrictive upon States or State legislation. The only question then is, whether congress is prohibited by the constitution from conferring similar powers upon a territory. If the power was lawfully conferred, its exercise would be lawful.

It is clear from the language of the constitutional provision that it refers exclusively to some court, either state or federal, or both: "In SUITS at common law where the value in controversy shall exceed twenty dollars, the right of TRIAL by jury shall be preserved." It does not provide that no LAW shall be passed impairing the right of trial by jury. Its language is like the rule of some court. It is a direct restriction upon the judicial department, and only an incidental restriction upon the legislative, to the extent that it legislates for the government of the courts. The latter clause of the amendment is still more explicit: "and no fact tried by a jury SHALL BE OTHERWISE REEXAMINED IN ANY COURT of the United States, &c."

The authorities leave no room for doubt that this amendment applies exclusively to the federal courts under the constitution.

Burrow vs. The Mayor and City Council of Baltimore, 7th Peters, page 243.

Story on Constitution, sec. 1763-78, notes.

In the matter of Smith, 10th. Wendell p. 449.

Murphy vs. The People, 2d Cowan p. 815.

Livingston vs. the Mayor, &c., of Washington, 8th Wendell p. 102.

Lake Erie, &c., Railroad Co., vs. Heath, 9th Indiana, p. 559.

Boring vs. Williams, 17th Ala. 510.

Colt vs. Eves, 12th Conn. 243.

Federalist No. 83.

This amendment, then, cannot in any manner affect territorial courts. Territorial courts are in no sense federal courts under the constitution, but are exclusively the creatures of congress. They are not constitutional courts but legislative courts, and are not recognized or provided for by the constitution. The constitution consequently could have no reference to courts that have no constitutional existence.

American Insurance Co. vs. Canter, 1st Peters, p. 541.

Benner vs. Porter, 9th Howard, p. 239.

Story on the Constitution, sec. 1325.

Constitution, art. III, sec. 1-2.

Organic act of Montana, sec. 9.

If we consider too the original design of this amendment, it is still more manifest that it could have no reference to the courts of a territory. Its object was, to protect the liberties of the people against federal aggression. The officers of the federal courts being appointees of the general government, it was feared that they might become its willing tools in encroachments upon the liberties of the people, and this amendment providing for trial by jury was adopted as a precaution against this danger. It sought not to weaken the local goverments, either state or territorial. Its whole object was to check and fetter the power of the federal government in its action through the federal courts. The diffusion of power through local jurisdictions, state and territorial, is the very converse of that centralization in the federal government against which this amendment was aimed.

If it was not the design of this amendment to interfere with the government of local courts, either state or territorial, then the law making power for those courts would not be restrained by it. The state legislatures could abolish the trial by jury in the state courts, unless restrained by their own constitutions, while in the territories, congress in its discretion, might not only abolish the trial by jury, but could even repeal the law altogether cre-

ating a territorial judiciary. It might provide only for a chancery court in the territories, and could confer upon it just such judicial powers as it saw proper. Congress possessing such powers, can, of course, delegate them to a territorial legislature.

But this action is a bill in equity, (creditor's bill,) and equity cases are not embraced in the provisions of the constitution relative to trial by jury.

Story on the Constitution, sec. 1768-73.

Parsons vs. Bedford, 3d Peters, p. 433.

But it may be claimed that if the Chancellor calls a jury at all, it must be a common law jury of twelve men. But unless the constitution prevents, a territorial legislature can abolish a common law jury by statute, as was done in this case.

Under the common law the Chancellor might have tried this case without a jury, or he could have referred it to one or more persons to report the facts. [But the legislature of Montana has made fraud a question of fact, and all facts triable by a jury. The same legislature has provided also, that nine men on the jury might find a verdict. The only necessity for a jury at all in this case, has been imposed by territorial statutes, and those statutes prescribe what the jury shall be.

But it may be claimed, as it was in the court below, that when Morse's appearance was withdrawn, this creditor's bill became an action at law against Dunphy, and lost all the elements of an equity case.

If not an equity case, then this appeal should be dismissed. Only equity cases can be brought to this court by appeal.

The San Pedro, 2d Wheaton, 132.

Bevens, et al, vs. Rumsey, et al, 11th Howard, 185.

But the withdrawal of Morse's appearance settled none of the equitable issues. The mortgage of Dunphy had defeated plaintiffs' executions at law. It was charged that this mortgage was fraudulent, and it still covered Morse's property as much after the withdrawal of his appearance as before. Plaintiffs' therefore still continued to require the aid of a court of equity to set aside this fraudulent mortgage.

The only remaining exception claimed by defendants, was to the action of the court in overruling their instructions. This exception was embraced in the same instrument as the one to the charge, and is liable to the same objections as have already been made to that portion of the instrument.

Being a simple statement filed with the clerk and signed by defendant's attorneys, it does not conform to the requirements of the Montana practice act.

It will also be observed, that fourteen instructions, many of them clearly erroneous, were presented in one batch to the court, and one general exception saved to the overruling of the whole.

In Harvey vs. Tyler, 2d Wallace, p. 328, Justice Miller, in delivering the opinion of the court, said: "Justice itself, and fairness to the court which makes the rulings complained of, require that the attention of that court should be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter, and remove the ground of exception. This opportunity is not given, when pages of instructions are asked in one prayer, and if refused as a whole, are excepted to as a whole."

The exception too, is certainly not in conformity with the Montana practice act, which requires that the point of the exception shall be particularly stated.

But in this case there was no general verdict, and only simple questions of fact were submitted to the jury. There was consequently no necessity for instructions upon abstract propositions of law. The charge given by the court embraced everything necessary for the information of the jury.*

But if this appeal shall be determined by the rules governing equity practice, these exceptions as already suggested, are of no importance whatever.

In submitting special issues to a jury in chancery cases "the manner of proceeding is entirely under the control of the court of equity," and the admission of evidence, instructions to the jury, &c., are all controlled by the discretion of the Chancellor.

2d vol. Daniels' ch. practice, (4th ed.) p. 1002.

Black vs. Shreve, 2d Beasly p. 457.

The Chancellor also, in calling and organizing the jury was properly governed by the laws "for the time being in force" in the territory of Montana.

2d vol. Daniel's ch. prac. p. 977-8.

As, too, the whole object of the Chancellor in submitting special issues to the jury, "is not to bind the court, but to satisfy its conscience," his approval of the findings of a jury was all that was necessary to give them validity. His approval made the

*Upon this point, refer also to brief filed in court below. (Record 109-10-11-12.)

findings his own. The Chancellor, in his discretion, could have approved the findings of even a less number than nine of the jury, and based his decree thereon, or might have made his own findings, regardless of the verdict of the jury.

Adams' Equity, (Wharton) 817.

Gresley's Equity Evidence, p. 401 to 405.

Dunn vs. Dunn, 11th Michigan 284.

Black vs. Shreve, 2d Beasly, 457.

Lee vs. Beatty, 8th Dana, 207.

ALEX. M. WOOLFOLK,
of Counsel for Respondents.

IN THE

Supreme Court of the U. S.

ELIJAH M. DUMPHY, Appellant,

vs.

T. H. KLEINSMIDT AND CHAS. E. DUER, Appellees.

JAS. O. BROADHEAD, for Appellees.

Southwestern Book and Publishing Co., 510 and 512 Washington Avenue.

In the Supreme Court of the U. S.

ELIJAH M. DUMPHY, Appellant,
vs.
T. H. KLEINSMIDT AND CHAS. E. DUER, Appellees.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Supreme Court of Montana Territory, affirming a decree rendered by the Territorial District Court for the Third Judicial District, Lewis and Clark County, Montana Territory.

The original proceeding in the case was by Bill in Chancery, filed in the Territorial District Court, on the 30th day of April, 1868, in favor of Theodore H. Kleinsmidt, Complainant, and against Benajah Morse, surviving partner of the late firm of E. & B. Morse, and Elijah M. Dumphy, Defendants.

The Bill was filed in behalf of Complainant and such other judgment creditors of Benajah Morse, surviving partner of E. & B. Morse, as might choose to come in and contribute to the expenses of the suit.

The allegations of the Bill are to the effect: that on the 12th day of March, 1868, Complainant recovered judgment against Benajah Morse, in the District Court of Montana Territory, as surviving partner of E. & B. Morse, for the sum of $16,957 50; that on the 19th day of March, 1868, an execution was issued, directed to the Sheriff of Gallatin County, where Defendant resided, and delivered to him, to be levied on the property of Defendant; that a transcript of the judgment was duly filed and recorded in the Recorder's Office of Gallatin County; that the execution was returned unsatisfied, and that, at the time of the institution of this suit, the judgment remained wholly unpaid.

That, on the 31st day of October, 1867, Benajah Morse, and his brother and partner, Elkana Morse, executed and delivered to Defendant, E. M. Dumphy, an instrument of writing, purporting to be a mortgage, and pur-

porting to secure an indebtedness of $30,000, owing by the two Morses to Dumphy.

This pretended mortgage was upon a large amount of property, consisting of a ranche, and a growing crop upon it, a large lot of cattle, and a stock of goods and other property, all of the value of about $70,000.

That, at the time of the execution of said pretended mortgage, the Morses were indebted to Erfort & Petring, of St. Louis, in about $16,000—which indebtedness was afterward assigned to Plaintiff—also, to Appleton, Noyes & Co. and William Young & Co., in the sum of about $15,000, to William Heron in the sum of $8,000, and to various other persons.

That the greater part of the property embraced in the mortgage consisted of accounts, wheat, hay, merchandise, cattle and other perishable property; that, by the terms of the mortgage, E. & B. Morse were to remain in possession and use of the property for one year, or until the maturity of the pretended indebtedness therein named.

That the conveyance was made to the use of the grantors thereon; and that it was further made with intent to hinder, delay and defraud the creditors of the said E. & B. Morse; that Dumphy was privy to the intent, and accepted the mortgage for the purpose of aiding E. & B. Morse to hinder, delay and defraud their creditors; that said mortgage was not accompanied by any change of possession of the property conveyed, but that E. & B. Morse continued to occupy the storehouse and sell and dispose of the goods long after the execution of the mortgage, and applied the proceeds to their own benefit, with the consent of Dumphy. That E. & B. Morse were not indebted to Dumphy in the sum of $30,000, nor were either of them indebted to him in that amount, and that the actual indebtedness was only $6,000 or $7,000, which indebtedness was, by agreement, to be paid in flour, delivered to Dumphy, in Helena, by E. & B. Morse.

That, on the 3d of January, 1868, Benajah Morse, surviving partner of E. & B. Morse, executed and delivered to Dumphy an assignment of all the property embraced in the mortgage and authorized Dumphy to sell it; that after this assignment, B. Morse, surviving partner of E. & B. Morse, continued to remain in possession and control of the property, and to sell it and collect the proceeds; that Benajah Morse, sole surviving partner of E.

& B. Morse, in conjunction with Dumphy, are running off and disposing of the mortgaged property, and converting it into money, so as to effectually place it beyond the reach of the creditors of E. & B. Morse; that Dumphy has prevented the Sheriff from levying on the property, by virtue of the executions aforesaid; that he and Morse have made away with the greater part of the mortgaged property; that Dumphy has already realized, in money, more than $30,000 from the mortgaged property; that Benajah Morse is wholly irresponsible, and that there is no property or assets belonging to the firm of E. & B. Morse, except that embraced in the mortgage.

Complainant prays that the mortgage be declared fraudulent and void against him and the other judgment creditors of B. Morse, surviving partner; that a receiver be appointed to take charge of the property, and that Defendants be restrained and enjoined from disposing of any of the property or paying out any of the proceeds thereof, and that the said receiver pay out of the proceeds of the property the judgment aforesaid, and for general relief.

E. M. Dumphy, in a separate answer, admits that judgment was rendered for $16,957 50, but denies that the judgment was regularly rendered; admits the execution of the mortgage on 31st of October, 1867, by E. & B. Morse to him.

He denies that the mortgage was made to hinder, delay or defraud any of the creditors of the said E. & B. Morse, but only for the purpose of securing money actually due, and to become due, as is set forth in the mortgage.

That, at the date of the execution of the mortgage, there was actually due and owing to him from E. & B. Morse, for goods actually sold them by him, the sum of $12,000; that E. & B. Morse offered to secure him in this amount if he would advance to them the further sum of $10,000; that thereupon E. & B. Morse executed their note to him for $30,000, which included the interest up to the time of the maturity of the note, and gave their mortgage to secure the whole, which is the actual amount due by E. & B. Morse to Defendant. He denies that any of this debt was fictitious, or that any part of it was to be paid in flour. He admits that B. Morse is the sole surviving partner of E. & B. Morse, but denies that he and Morse are running off the property. He admits that he has sold part of the property, from which he has realized

about $16,000, for which amount the note he holds on Morse is entitled to a credit. He further alleges, that prior to the rendition of the judgment in favor of Plaintiff, the interest of Benajah Morse in all the goods and merchandise in the store was levied on, by execution, in favor of one Heron and against E. & B. Morse, and sold and bought in by Defendant. He further says, that on the 3d of January, 1868, he made an agreement with B. Morse by which he was to take possession of the mortgaged property, and sell it for the payment of the debt due him; that, in pursuance of said agreement, he did take possession of the goods in the store, amounting in value to the sum of $4,649; that he also took possession of 158 head of cattle, 70 head of which had been seized under the Heron execution against E. & B. Morse; that he also took possession of 501 sacks of flour, and $121 worth of fixtures that were in the said store, and the undivided half of one threshing machine; the amount of sales was $16,000, which should be credited on the said note and mortgage. He says he had only *about* $1,000 worth of goods in the store which, at any time, belonged to E. & B. Morse. He says all his transactions with Morse were *bona fide;* that he has not more than enough property covered by the mortgage to secure his own debt, and that a large amount of stock, included in the mortgage, strayed away, or were taken by other persons, and have never been in possession of Defendant. He admits, also, that he has some notes and accounts, the amount of which he does not remember, but which, when collected, are to be applied to the payment of the indebtedness due him from E. & B. Morse.

Benajah Morse also made his separate answer, in which he says that the judgment rendered against him was and is void. He admits the execution of a note of $30,000 to E. M. Dumphy by him and his co-partner, and a mortgage to secure the same, and says they were made in good faith to secure a debt of $12,500 for merchandise, and $10,000 borrowed money and interest thereon.

He denies any fraud in the transaction. That the amount of goods, wares and merchandise in Morse's store on the 3d day of January, 1868, was of the value of $4,649 01, which, with the store house, was received by E. M. Dumphy in part satisfaction of the note and mortgage at the sum of $4,649 01; that, at the time of the answer, there was not exceeding $1,000 in value of the

goods delivered by him to Dumphy; that the balance of the goods on hand have been purchased by Dumphy to replenish his stock. He denies all allegations of fraud.

On the 28th of June, 1868, Charles E. Duer was, by order of the Court, made a party Plaintiff in the case. He states in his petition, that on the 12th of March, 1868, he obtained judgment against Benajah Morse, surviving partner of E. & B. Morse, for $15,410 05, that an execution was issued thereon and returned unsatisfied, that an alias execution was issued and directed to another county upon which the sum of $355 15 was realized, and the execution returned unsatisfied as to the balance. The validity of the judgment is not denied.

On the 27th of June, 1868, the appearance of Benajah Morse in this action was withdrawn, and no further defense made, as to him.

On the 15th of March, 1869, the case came up for trial in the District Court of Lewis and Clark County, it having been removed to that County by change of venue.

And on the 2d day of April, 1869, a decree was rendered by the District Court, by which the mortgage referred to in the bill was declared fraudulent and void, and judgment rendered in favor of the Plaintiffs and against E. M. Dumphy for the sum of $35,737 50, together with costs added at $7,149 79.

From this decree E. M. Dumphy appealed to the Supreme Court of the Territory, when the decree of the District Court was affirmed, and an appeal taken thence by E. M. Dumphy to the Supreme Court of the United States.

From the testimony in the case, it appears that on the 31st of October, A. D. 1867, Benajah and Elkana Morse (who were partners in business) executed a mortgage to E. M. Dumphy to secure a note for $30,000, due twelve months thereafter. This mortgage deed purported to convey Morse's Ranche of 640 acres, two-thirds of the crop on it and the stock on the ranch, also a lot and storehouse in Gallatin Valley, known as Morse's Store, with all the goods, wares and merchandise therein, and all book accounts and evidences of indebtedness due the Morses, 225 head of cattle, 10 head of horses and colts, 2 jacks, 12 mules, with harness, 4 saddles, 5 wagons, 100 tons of hay, 300 bushels of wheat, now at Madison Mills in Gallatin County, 1 reaper and mower, the undivided half of 1 threshing machine, and 6 houses and lots in Summit

City. It is provided, by the terms of the deed, that, until default be made in the payment of the note for $30,000, the grantors are to remain in possession of, and may *carefully use all of said property.*

On the 3d of January, 1868, the parties entered into a written stipulation by which E. M. Dumphy is authorized to take possession and control of all this property, and dispose of the whole, or any part of it, for the purpose of satisfying the note and mortgage referred to, having due regard to the interests of other creditors of E. & B. Morse, and of the parties to the mortgage; and, as the property is sold and the money received, Dumphy agreed to credit the amounts so received upon the $30,000 note, allowing the Morses two per cent. per month on all payments so made upon the note.

Both those instruments were filed for record a few days after their execution, in the proper office for recording such instruments.

Between the date of the execution of the mortgage and the written agreement, Elkana Morse was killed, and Benajah Morse was then the sole surviving partner of the firm of Morse & Morse.

On the 31st of October, 1867, the day of the date of the mortgage, judgment was rendered by the District Court of County, in favor of Hamilton & Heron against E. & B. Morse for $1,827.

After the execution of the mortgage, as well as after the execution of the written agreement of January 3d, 1868, the business in the store in Gallatin Valley continued as it was before: the Morses, up to the death of Elkana, and after his death, Benajah Morse continued to sell goods, collect money due the firm, settle accounts, taking sometimes money, sometimes property, and sometimes notes in settlement of accounts due the Morses; they had the same clerk, *Sill*, who had been with them for twelve months.

On the day of the date of the mortgage, Dumphy told Heron (see p. 30) that he had sold the Morses a bill of goods for 1,000 sacks of flour, to be delivered in Helena by the 1st of January, 1868; that the contract was, if the flour was not delivered by January 1st, 1868, the Morses were to pay $10 per sack for every sack they failed to deliver by that time, and that he had taken security from the Morses for their compliance with the contract.

Kleinsmidt, the nominal Plaintiff in this case, testified that he held the claim of $16,000 against the Morses, for his uncle in St. Louis for collection, that it had been assigned to him for that purpose; that, in the latter part of October, 1867, he had a conversation with Elkana Morse about his uncle's claim, who told him that he was about to purchase some goods from Dumphy, and was to pay for them in flour, to be delivered by the 1st of January, 1868, that the farmers were owing him, and could pay in grain; that he could pay Dumphy the flour, and could sell the goods for cash, and thus pay off the debt he owed in St. Louis. He said, at the same time, he thought the Hamilton & Heron suit would go against him.

The next day, Morse told the witness that he had executed a mortgage on all his property to Dumphy, and that he did not intend Hamilton & Heron should make anything out of him, but the mortgage was not intended to affect his other creditors; at the same time, he showed witness a written agreement, signed by Dumphy, and known by witness to be his signature, by which Dumphy agreed to cancel the mortgage in question whenever the Morses wanted him to do so. Elkana Morse said this agreement would secure him against Dumphy, and the mortgage would keep Hamilton & Heron off, but that all other indebtedness should be paid. He said he had purchased $6,000 or $7,000 worth of goods from Dumphy and was to pay in flour.

(See p. 35 and 36 of Record.)

Elkana Morse was killed by Heron on the 4th of December, 1867. In November preceding he told Hugh Kirkendall that he was to deliver to E. M. Dumphy 1,000 sacks of flour by the 1st of January, and that would square him with Dumphy. The witness was owing the Morses $9,000, which he paid to Benajah Morse in December, 1867, at which time he told witness that they were owing Dumphy 1,000 sacks of flour for some goods they had bought of him; and in January, 1868, Benajah Morse told him that Dumphy had got every thing he had, that he had to trust some person, and Dumphy had never gone back on him.

(See p. 37 of Record.)

Several other witnesses testify to the same effect as to declarations made to them by Benajah Morse during the winter of 1867-68.

See testimony of Hemenway, p. 42.
" Joseph Wilson, p. 44.
" J. W. Grannis, p. 38.
" S. B. Weddell, p. 54.

Dumphy, the Defendant, admitted, in a conversation he had with one A. G. P. George, a witness in the case, when witness saw the mortgage and expressed surprise that the Morses should owe him so much as $30,000, that the mortgage was for $10,000 worth of goods, to be paid in flour.

See p. 48 of Record.

This witness, as well as quite a number of others, testify that Morse and his clerk, Sill, carried on the store as usual during the winter and spring of 1868, and that they saw no difference in the manner in which it was conducted after the 1st of January, 1868, from what it was before.

A number of witnesses testify to the settlement of their accounts at the store with Benajah Morse after the 1st of January, 1868.

Anders, a witness who was clerk for Dumphy in October, 1867, says he was present when a contract was made, in October, between Dumphy and Morse, for the sale of goods to be paid for in flour, which was to be delivered by the 1st of January, 1868, that the contract was made the evening before the Morses left Helena for Gallatin; that he went down with them the next day in a wagon, and that they, the Morses, on the way down, talked about the manner in which they would get flour to fill their contract with Dumphy; they said nothing about the contract being canceled, or about the mortgage to Dumphy.

See p. 40 of Record.

From the testimony of H. Comley, p. 40, and of John W. Moffatt, the Deputy Sheriff, p. 49, it appears that the property conveyed by the mortgage deed to Dumphy was of the value of about $50,000, exclusive of the goods.

Kirkendall paid B. Morse $9,000 in December, and if Dumphy loaned the parties $10,000 in October, it will appear that the Morses had, in money and property, about $70,000 in the winter of 1867-68, none of which went to the creditors, and Benajah Morse says when he left Montana in the spring of 1868, he had only money enough to take him home respectably. P. 66.

On the trial of the case, certain issues of fact were

submitted to a jury, and upon those issues the finding of nine of the jurors were in favor of the Complainants; in other words, the finding of nine of the jurors sustained the allegations of the bill.

By the Territorial laws of Montana it is provided, that:

"In all civil cases, if three-fourths of the jurors agree upon a verdict, it shall stand, and have the same force and effect as if agreed upon by the whole of the jurors."

See Sess. Acts of Montana Territory of 1869, Sec. 15, p. 66.

Various instructions and declarations of law were asked of the Court by the Defendant to be given to the jury, all of which were refused.

The Court instructed the jury that nine of their number might find a verdict. It is claimed, on the part of the Defendant, that exceptions were taken to the rulings of the Court in these particulars, as also to the judgment of the Court in admitting certain testimony, offered on the part of the Complainants, in the course of the trial. And these alleged errors are asked to be reviewed on appeal, upon the ground that this proceeding is an action at law, the Territorial Legislature having provided for but one form of civil action, and that issues of fact shall be tried by a jury, and that the finding of nine men out of twelve is not the finding of a jury, that provision of the Territorial laws being in conflict of the Constitution of the United States, and therefore void.

1. In its nature, this proceeding is a chancery proceeding—the Complainant asks the interposition of a Court of Equity to do for him what a Court of Law can not do: to set aside a conveyance of property, duly executed according to the forms of law, upon the ground that it is fraudulent, and, therefore, conveys no title to the mortgagee.

The distinction between law and equity are preserved in the judicial system of Montana Territory by the organic act, and the Courts of the Territory have the same chancery jurisdiction as the Circuit Courts of the United States.

The 9th section of the organic act vests the judicial power of the Territory in a Supreme Court, District Courts, Probate Courts and Justices of the Peace. . . The jurisdiction of the several Courts herein provided for, both appellate and original, and that of the Probate Courts and Justices of the Peace, shall be limited by

law: *provided*, that Justices of the Peace shall not have jurisdiction of any matter in controversy, when, &c., and the said Supreme and District Courts, respectively, shall possess *chancery, as well as common law jurisdiction.*"

Sec. 13, Stat. at Large, p. 88.

The 6th Section of the Act provides, that the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this Act.

Sec. 13, Stat. at Large, p. 88.

By the 13th section of the organic act it is provided, that the Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Montana Territory as elsewhere within the United States.

13, Stat. at Large, p.

It needs no argument to establish the proposition, that these several provisions of the Act establishing Montana Territory, vest in the Courts of the Territory chancery jurisdiction, as it is known in the jurisprudence of the United States, and established by Acts of Congress and the rules of the Supreme Court.

The 2d section of the Act of May 8th, 1792, provides, that forms and modes of proceeding, in suits of equity and of admiralty and maritime jurisdiction, shall be according to principles, rules and usages which belong to the Courts of Equity and to Courts of Admiralty, respectively, as contradistinguished from Courts of common law, except as provided by the Act to establish Judicial Courts of the United States, subject to such alterations and additions as the Courts, respectively, shall deem expedient, or to such Regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any Circuit or District Court.

Vol. 1, Stat. at Large, p. 276.

The Supreme Court of the United States, in the case of Robinson vs. Campbell, 3 Wheaton, 222, in commenting upon this statute, decides, ".that the remedies in the Courts of the United States are not according to the practice of the State Courts, but according to the principles of common law and equity, as distinguished and defined in that country, from which we derive our knowledge of those principles.

See also United States vs. Howland, 4 Wheaton, p. 108.
" Fletcher vs. Morey, 2 Story, 567.

The equity jurisdiction, says Judge Story, is co-incident and co-extensive with that exercised in England.

In Bennett vs. Butterworth, 11 Howard, 669. This Court says, that, although the forms of proceeding and practice have been adopted in the District Court, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be flended together. The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity: if the claim be a legal one, he may proceed according to the State law, but if the claim be an equitable one, he must proceed according to the rules which this Court has prescribed, regarding proceedings in equity in the Courts of the United States; and in Thompson vs. Railroad Companies, 6 Wallace, p. 134, this Court says: "The Constitution of the United States, and the Acts of Congress, recognize and establish the distinction between law and equity. The remedies in the Courts of the United States are, at common law and in equity, not according to the practice of the State Courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles."

This case came up from the State of Ohio, where "the distinctions between actions at law and suits in equity and the forms of such actions are abolished;" and where the practice of the State Courts is adopted by the Federal Courts.

The Constitution of the United States (Art. VII) declares that, "in suits at common law, where the value at controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

In the case of Woodworth vs. Rogers, et. al., 3, Woodbury & Minots R., p. 149, Judge Woodbury says, in speaking of the power of a Court of Equity to dispense with a jury in the trial of an issue of fact, "it is a mistake to suppose that this power, in its legitimate use, impairs, supersedes or prevents the trial by jury, where it. In most questions pending in Courts of Chancery, or on the equity side of Courts of Law, a trial by jury has never been usual in this country or abroad; the 7th

amendment to the Constitution secures that trial only in cases "at common law." But still, chancery may order an issue to be tried at law, to help itself, as to facts, and re-tried, if dissatisfied with the verdict, or it may decide facts for itself, in all cases, except, perhaps, in England, in case of an heir at law disputing a will, and a rector sueing for tithes."

2. So far as the powers of the Courts of Chancery are concerned, the rule laid down by Judge Woodbury, in the case of Woodworth vs. Rogers, is well established in England and in this country.

The verdict is to satisfy the conscience of the Chancellor, and if he is dissatisfied, he may disregard it. 2 Daniel, Ch., Practice, p. 1091.

The Court has never considered itself bound by the verdict, and has, even without directing a new issue, decided against the verdict. 2 Daniel, Ch., P., p. 1115.

See, also, Bullen vs. Michel, 2 Price, 423.

" Apthrop vs. Comstock, 2 Paige, 488.
35 Penn. State R., p. 88.

" Fanks vs. Shadd, 2 Dickens, 576.

" United States vs. Bernardo Sempery, 1 Hemp, 118.

The verdict of a jury, on a feigned issue, is not conclusive, for the Chancellor may have it tried again and again, and may even decree against a verdict.

See, also, Harding vs. Harding, 11 Wheaton, 125.

" Allen vs. Blunt, 3 Story, 746.

In this case, Judge Story says, the Court may, at its pleasure, set aside a verdict and grant a new trial, or, disregarding it, may proceed to hear the cause, and decide in contradiction to the verdict.

See, also, Foot vs. Silisby, 2 Blatchford, 275.

" Same case, 20 Howard, 385.

" Orchard vs. Hughes, 1 Wallace, 73.

The action of the Chancellor on the verdict is a matter resting in his discretion, and is not subject to review in the Appellate Court.

Block vs. Shreve, 2 Beasley, 456.

If the Chancellor may disregard the verdict of a jury, and set it aside entirely in rendering his decree, what matters it how that verdict or finding is made, whether by a bare majority, or by nine of the twelve.

3. It is claimed that, on the trial below, the Court admitted testimony that ought to have been excluded.

But the Court, in a chancery case, will not grant a new trial merely on the ground that the judge received improper testimony on the trial of the issue, or that he rejected that which was proper, if, on the whole facts and circumstances, the Chancellor is satisfied the result ought not to have been different, if such testimony had been rejected in the one case or received in the other.

See Apthrop vs. Comstock, 2, Paige, 488.

In Barker vs. Ray, 2 Russell, Ch. R., p. 75, Lord Eldon says: "Issues are directed here to satisfy the judge; and looking at the depositions in the case, and the proceedings, he is to see whether, on the whole, they do or do not satisfy him. It has been ruled over and over again, that if, on the trial of an issue, a judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though a Court of law will grant a new trial, yet, if this Court is satisfied, it will not grant a new trial merely on such grounds."

It is not necessary to multiply authorities or argument to establish the plain proposition that, if upon all the facts of the case, the decree of the Chancellor is right, it will not be disturbed, whatever errors may have been committed on the trial.

4. It is very clear that the whole proceeding, on the part of Dumphy and the Morses, was a device by which the Morses were to be enabled to cover up their property and put it beyond the reach of all their creditors, except Dumphy. The mortgage was executed on the very day on which the Heron judgment was rendered against them. This was a bitterly contested suit, and produced an enmity between the parties which resulted in the killing of Elkana Morse by Heron shortly after the judgment was rendered, and explains the reason why E. Morse declared, as Kleinsmidt says he did, the day after the judgment, that he did not intend that Hamilton & Heron should make anything out of him, and in the same conversation, told Kleinsmidt that he had made a mortgage to Dumphy of all his property. It was then, also, that Morse told Kleinsmidt he had a paper signed by Dumphy which would enable the Morses to have the mortgage canceled when it became necessary, and that the other creditors should be paid, but that Hamilton & Heron should not. If the testimony of Kleinsmidt is true, the fraud is established beyond ques-

tion, and he has no pecuniary interest in the result of the suit.

There is no doubt but that the Morses were indebted to Dumphy, but not to such an amount as to make it necessary that Dumphy should require all the property of the Morses, to the value of $60,000, to secure it.

Morse told Kleinsmidt that he had bought $6,000 or $7,000 worth of goods from Dumphy, and that he was to pay for them in flour.

Heron says Dumphy told him, on the day of the date of the mortgage, that he, Dumphy, had sold the Morses a bill of goods, which was to be paid for in flour, delivered at Helena.

In November, Morse told Hugh Kirkendall that he was to deliver Dumphy 1,000 sacks of flour for some goods they had bought from him, and that would square him with Dumphy. Dumphy admitted the same thing, in substance, to A. G. P. George, and that the mortgage was to secure $10,000 only.

Anders, a former clerk of Dumphy, was present when the contract for the delivery of the flour was made, that it was made the evening before the Morses left Helena for Gallatin; that he went down with both the Morses the next day, and that they talked about the flour contract on their way down, and how they were to fill it. Kratzer, witness for Defendant, testifies to the same purport. See p. 69.

The mortgage was made to secure a note of $30,000, due at twelve months. By its terms the grantors were to remain in possession of the property, until default made in the payment of the note, and *carefully use* it. A large portion of the property could not be used without being consumed—for example, the goods in the store, the crop on the ranch, the wheat at Madison Mills, the 100 tons of hay, the 225 head of beef cattle. The Morses did continue to do business as before, and as if the property was their own.

The evidence is very strong to show a fraudulent contrivance to hinder and delay creditors.

On the 3d of January, 1868, another written agreement was made, by which the terms of the mortgage were changed, so as to authorize Dumphy to take possession.

It is fair to treat these two papers as one instrument; a mortgage to secure $30,000 to Dumphy, with a provision that the mortgagee should take possession of the

mortgaged property. But he did not take possession, or at least the mortgagor retained possession, sold goods, collected money, had the same clerk with him as before. There was no open and notorious change of possession.

By the laws of Montana Territory on the subject of chattel mortgages, it is provided: "That no mortgage of goods, chattels or personal property shall be valid, unless possession of the property shall be delivered to, and remain with the mortgagee, or unless the mortgage shall be acknowledged and recorded." See Sec. 1, p. 339, Laws Montana.

It is further provided, by the same Act, that a mortgage, properly acknowledged, shall be admitted to record, and if *bona fide*, shall be valid for one year, notwithstanding the property mortgaged shall be left in possession of the mortgagor; *provided*, that such conveyance shall provide for the property so to remain with the mortgagor. See Sec. 3, p. 339, Laws Montana.

In this case it was provided by the modified contract of January 3d, 1868, that the property should not remain with the mortgagor, and yet Benajah Morse did remain in possession of the property, and remained in possession of it after the 3d of January, sold the goods, collected and settled the accounts. How much he applied to the payment of this alleged indebtedness of $30,000 and how much he put in his own pocket, does not appear.

Dumphy, in his answer, admits that he realized *about* $16,000, which he has given Morse credit for.

Sill and Seagrass, the clerks of Morse, who must have known all about the property and the sales, are not examined as witnesses.

Dumphy admits, in his testimony, that the property he received from Morse was worth about $19,000, and that the expense incurred in the sale of it was about $3,000, but on what account, or what items of expense were incurred, he does not show.

In his answer, he admits that he has some notes and accounts in his possession from the sale of the property, but does not disclose what they are nor of what value.

On the 28th day of October, 1867, Dumphy says, he sold the Morses $12,500 worth of goods. On the 28th they were delivered. He knew that the Hamilton & Heron suit was then pending and on trial; on the 29th he heard of a judgment against E. Morse for $15,000, and yet, on the 31st, he says he loaned them $10,000, and took a note for

the whole amount, due in twelve months, with a mortgage to secure it on a stock of goods, a lot of beef cattle, hay and wheat, which the Morses were to keep possession of and *carefully* use during that period of twelve months, at the end of which time, if the debt was not paid, with five per cent. per month interest on a large portion of it, the property should be sold for the payment of the debt. How such property could be carefully used, or used at all, without being consumed or disposed of, it is difficult to understand. But it is not difficult to see how such a device might be used to keep off creditors and enable the Morses to dispose of the property, and put the proceeds in their pockets.

JAS. O. BROADHEAD,
For Appellees.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1870.

E. M. DUNPHY, Appellant,

vs.

T. H. KLEINSCHMIDT AND C. E. DUER.

F. A. DICK,
Of Counsel for Appellees.

J. L. Pearson, Printer, cor. 9th and D sts.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1870.

E. M. DUNPHY, APPELLANT,

vs.

T. H. KLEINSCHMIDT AND C. E. DUER.

A creditor's bill was filed on the 30th April, 1868, by Kleinschmidt (p. 8) against Benajah Morse, surviving partner of E. and B. Morse and Dunphy, in the territorial district court of the 1st district, in Montana Territory, the object of which was to set aside, on the grounds of fraud, a mortgage executed by E. and B. Morse to Dunphy to secure $30,000, dated October 31, 1867.—(p. 59.)

Kleinschmidt began suit against the Morses on December 31, 1867, (p. 78,) and on 12th March, 1868, obtained judgment for $16,957.50, (p. 5,) which bore ten per cent. interest; and Charles E. Duer, another creditor, who came in and filed his bill on 23d June, 1868, (p. 24,) obtained judgment also on 12th March, 1868, for $15,410.

Dunphy filed his answer to Kleinschmidt's bill on 23d June, 1868, (p. 14,) denying fraud, and answered Duer's bill on 24th June, 1868, (p. 26,) setting up a levy on certain property named under execution on Duer's judgment, and a suit growing out of such levy as a bar.

Kleinschmidt's bill shows that execution was issued on

his judgment, and a return of no property found; also, that the Morses were then indebted to several firms in the amount of $54,000. That by the mortgage in question they assigned to Dunphy, 1st, a ranch in Gallatin valley of 640 acres, with the buildings thereon; 2d, all the crops thereon, growing and harvested; 3d, also the store and lot of the Morses in Gallatin valley; 4th, all the goods in the store; 5th, all the accounts and money due the mortgagors "from any and all persons whomsoever;" 6th, also 225 head of cattle on said ranch; 7th, ten head of horses; 8th, also twelve mules, harness, saddles, &c.; 9th, also five wagons; 10th, a threshing machine; 11th, 100 tons of hay and 300 bushels of wheat at Madison Mills; 12th, a reaper and mower; 13th, also six houses and lots in Summit City. This property alleged to be worth $70,000. The insolvency of the Morses is alleged, and the execution of the mortgage with the intent to defraud their creditors. The bill denies indebtedness of the Morses to Dunphy, excepting for a stock of goods which he sold them on 27th October, 1867, and for which he was to be paid 1,000 sacks of flour by 1st of January, 1868; also alleges continued possession of the property after the mortgage by the Morses, and their exercise of control and acts of ownership over it. That Dunphy's fraudulent combination with the Morses makes him liable to the creditors, who, but for his conduct, would have made their debts out of the property of the Morses; also, that Dunphy, by sales of the property after he took possession, has realized over $30,000 from the property.

And there is a prayer for the appointment of a receiver, and for judgment for so much of the debt as is not satisfied by the proceeds of the property.

Dunphy, in his answer, says, at the execution of the mortgage, there was due him from the Morses, for goods sold, $12,500, "and that he applied to them to secure him, which they at first declined doing; and the next day after they offered, provided he would advance them $10,000,

to pay him interest thereon at 5 per cent. a month, and would give him said security, which Dunphy consented to do, and did advance them the said $10,000 in United States notes. Whereupon the Morses executed the papers for $30,000, and which included interest."—(p. 15.)

The items are as follows:

$12,500—estimated value of goods.
1,500—1 year interest at 1 per cent. a month.

$14,000
10,000—cash advanced.
6,000—interest for 1 year on same at 5 per cent. a month.

$30,000

B. Morse filed an answer on 22d June, 1868, (p. 20,) but on 27th June his appearance was withdrawn, and the case proceeded without him.

On 15th March, 1869, the case came on for trial, and the issues of fact were submitted by the court to a jury, and the court, on 2d April, 1869, rendered a decree for the plaintiffs.—(p. 93.).

An appeal was taken to the supreme court of the territory, (p. 95,) and the decree of the court below was affirmed.—(p. 115.)

ARGUMENT ON THE FACTS.

The issue was, whether the mortgage to Dunphy was fraudulent or not.

The plaintiffs show that the goods sold by Dunphy to the Morses were to be paid for in 1,000 sacks of flour, to be delivered by the 1st of January, 1868. The defendant admitted that this had been the consideration first agreed upon by the parties, but alleged that the bargain was changed, and that the second bargain was as stated in the answer, and that this new bargain totally set aside the first one made.

I. The plaintiffs insist that the first bargain was not rescinded, but that the parties went forward and did carry it into execution.

This is shown by the fact that immediately on the return of the Morses from Helena to their home in Gallatin county, they made great efforts to procure wheat, and sent the same to several mills to be ground, and that while this was being done they stated to the millers and others who were employed by them in these operations, that they were under said contract to Dunphy, and they went on and did furnish the flour to him; that while this was going on Dunphy was aware of the action of the Morses, and the flour was shipped to and received by him at Helena.

This bargain for 1,000 sacks of flour was made in Helena on 27th October, 1867, and the goods were not delivered then.

See Dunphy's statements, (p. 57.)

On 31st October the Morses left Helena, (Herron, p. 30; Anders, p. 40,) and drove down in their own wagon in company with G. W. Kratzer, (p. 69, and Anders, p. 40,) to Gallatin county.

On *that evening* Wm. Herron had a conversation with Dunphy, and says: "Dunphy told me that he had sold the Morses a bill of goods for 1,000 sacks of flour, to be delivered to him in Helena by the 1st of January, 1868. I think it was on the last day of October, but am positive it was after E. and B. Morse had left Helena for Gallatin county."—(p. 30. See Anders, p. 40.)

Anders says, (p. 78,) "My best impression is that the morning the Morses left town, the last of October, 1867, that Dunphy gave me the flour contract with E. and B. Morse to copy." The Morses also talked about the contract all the way from Helena to their home. See Kratzer, (69,) who is *defendants'* witness, and see Anders, (p. 40.)

Their arrangements to carry it out and execution of it

is shown by the testimony of the millers and employés who were so engaged by them.

John W. Grannis, p. 38. The Morses told him the last of October or the first of November, 1867, they wanted 1,000 sacks of flour ground to deliver at Helena, to Dunphy & Bentley, by 1 January, 1868,—this was in payment of a bill of goods bought from Dunphy. Grannis was the *miller* at Madison Mills, Gallatin City. The "Morses were there several times after this, during November, and always seemed anxious to have the 1,000 sacks of flour ground." Over 600 sacks of flour were delivered to Dunphy on Morses' account.—(38.) Question.—"How do you know that it was delivered to Dunphy? Answer.—*We shipped it to Dunphy in Helena, to his order.* He was there at the mill once or twice *to see about it.*" Says that Fredericks, the mill-wright, had conversations with Dunphy about it.—(39.)

On page 45 Fredericks is examined.

Henemeway, p. 42. Was employed at Madison Mills November, 1867. The Morses were there, and said they had bought goods of Dunphy and were to deliver him 1,000 sacks of flour in payment by January 1, 1868, or were to pay him $10 a sack for what they failed to deliver by that time. They seemed very anxious to get the flour in time, and spoke to me several times about it.

Joseph S. Wilson, 44, (one of Dunphy's securities.) See his statement in full. He talked with all the parties, and was miller at Madison Mills.

S. B. Weddell, p. 54, to same effect.

G. W. Kratzer, witness for defendant, p. 68. "On October 26, 1867, heard Dunphy make a proposition to sell the Morses a stock of goods for 1,000 sacks of flour. * * I had possession of the store for Dunphy January 4, 1868. I sold goods for wheat for Dunphy. * * The Morses boarded with me, and I was very intimate with them and familiar with their private business. *I never knew of any change of the flour contract, or that it was done*

away with. The Morses did not tell me that they had given Dunphy a mortgage for $30,000. I went down to Gallatin valley in company with the Morses and *Anders* after they left Helena, and I did not hear them say anything about the flour contract with Dunphy being done away with; they talked all the way down about the flour contract with Dunphy, and about getting in the flour to Helena to fill it by the first of January, 1868; this was the time they were to deliver the flour to Dunphy under the contract that I heard."

Anders, p. 40, clerk for Dunphy, and present when the contract was made. "Do not know that the contract was changed. I am positive the flour contract between Dunphy and Morse *was consummated the evening before or the morning the Morses left town for Gallatin.* I went down to Gallatin county with E. and B. Morse in a wagon, and I know they talked all the way down about how they were a going to fill the contract with Dunphy."

O. E. Penwell, a miller, 34, says: Morse told me wheat would be delivered for him by Thompson and others, and that it was to be ground for Dunphy. The quantity which has been delivered to be ground into flour for Dunphy was about 475 bushels, and 115 sacks of flour have been delivered to Chestnut & Small for Dunphy.

Money owed by me to Morse was settled in May, 1868, *in flour delivered to Dunphy.* The above conversation with Morse was in February.

R. P. Vivion, receiver at Madison Mills from December 5, 1867, to 25 June, 1868. The Morses had wheat ground into flour,—about 500 bushels of theirs in the mill when I went there, and they continued to deliver wheat there from time to time until about 1st March. The wheat delivered by the Morses, after being ground, the flour was sent to Dunphy.—(p. 48.)

II. The mortgage was made without consideration, and was a fraudulent contrivance to shield the possession and property of the Morses from their creditors.

The Morses continued in possession from October 31, 1867, to about 1st of April, 1868, nearly six months.—(Wilson, p. 44; George, p. 49; Moffit, p. 49; Weddell, p. 53.)

Kratzer, *defendants' witness*, p. 69, says: "There was no change in the persons that staid in the store after January 3, 1868, until Leadbetter came down about the 18th March. Morse and Sill had run the store before January 3, 1868, and they continued to run it after January until Leadbetter came down in March."

Sill was clerk for the Morses, and continued after January.—(Burch, 33; Curtis, 32.)

John S. Wilson says: "Sill was an old clerk of the Morses; has been since 1866," p. 44. "Saw Sill, and Morse, and Kratzer there. The same persons were there in January that were there before," p. 45. "*Hard to tell whose property it was about that time.*"—p. 44.

A. George, p. 49: "I was in Morse's store several times during January, 1868. I saw no difference in the way it was carried on, or in the persons carrying it on. Morse and Sill still ran the store as usual. I was also in the store several times in March and April. I often saw Morse in the store during that period selling goods as before."—p. 49.

J. W. Moffit, p. 49: "Was deputy sheriff; was at Morse's store in summer of 1867, and January to May, 1868. Morse and Sill in the store in 1867, and Morse, Sill, and Dunphy in January, 1868; and in May Morse, Sill, Dunphy, and others." "When I was there in January Morse was selling goods, and had charge of the store; and also in May, 1868, Dunphy was in the store and Morse was behind the counter settling accounts and selling goods."—p. 49.

Many other witnesses testify to transactions showing the continued possession and management of the business by Morse.—(See Perkins, p. 30; R. B. Curtis, p. 31; W. Curtis, p. 33; Brewer, p. 43.)

The deed of January 3, 1868, p. 61, modified the original deed and put the right of possession in Dunphy; but as the actual possession continued with Morse until April, the mortgage became void under sec. 3 of the statute of Montana on chattel mortgages.

III. The proof is inconsistent with the actual payment of $10,000 by Dunphy to Morse on 31st October, 1867.

Not a witness is produced who counted any of the money; no banker testifies to furnishing Dunphy with any part of it; it does not appear that he had it on hand before the loan; it does not appear what the Morses did with any of the money, and the surviving one says he did not receive it, nor does he know what his brother did with it, p. 62; and Dunphy says, in his affidavit, p. 84, "he had made diligent search and inquiry to ascertain what the Morses had done with the money, but was unable to ascertain to whom any of said money was paid, or what the Morses did with the money, or any part thereof." This in the face of Morse's being in the store and in constant contact with Dunphy for six months. Nor were the Morses in funds after the pretended payment of the money, for several witnesses testify, in order to pay very small bills, they had to borrow from others.—(See F. Buchar, p. 78, and E. S. Tenell, sheriff, p. 78.) None of their creditors were paid. No banker ever shows the account of the Morses was increased by such payment, nor Dunphy's lessened.

The persons who speak of the money being counted, or who were present, are Dunphy, p. 57; B. Morse, p. 65; Lemon, p. 62; Leadbetter, p. 67; Chumasero, p. 62.

Not one of these witnesses says that he counted the money. The only witness who had anything to do with the money was Leadbetter, who shows that Dunphy did not have it on hand, and he went out to sell some gold dust in a peach can, but brought back no money; and then Dunphy went out and sold dust and brought back money.

How much he does not know, or else Dunphy did not wish him to say.

Anders, p. 78, says: "I was clerking for Dunphy in October, 1867, in his store in Helena. I saw no money counted there on 31 October, 1867, between Dunphy and Morse."

IV. The value of the goods and property covered by Dunphy was sufficient to pay the plaintiff's debts, and is shown by the witnesses to be worth as follows (see testimony of A. George, p. 48; J. W. Moffitt, sheriff, p. 49; E. Terrell, p. 48 and 40; J. C. Chance, p. 40; M. O. Codding, p. 41; Comly, 40):

200 head of cattle at $60 each	$12,000
Cattle sold by Dunphy to Kratzer, 34 head, at $50 to $75 each	5,000
75 cows and young stock at $50 each	~~3,750~~
Ranch and improvements	2,000
12 mules, $125 each	1,500
Horses	500
Threshing machine	1,200
Store house and lot	1,000
	$26,950 23200
Goods, 12 to 15,000	12,000
Accounts	10,000
	$48,950 43200

In addition to this is the wheat and flour received by Dunphy; also hay and crops on the ranch.

A. George, 48: In January, 1868, I saw 200 head cattle on Morse's ranch embraced in the Dunphy mortgage, worth about $60 a head. $12,000. Also about 75 cows and young stock, and also about 34 head of cows which Dunphy sold to Kratzer, worth from 50 to $75 dollars each. (This is, say 100 head, and at $50 each, worth $5,000.) "The above lots of cattle were, I know, still on

Morse's ranch about the middle of January, 1868, after Dunphy claimed to have taken possession."—(49.) "This mortgage prevented me from collecting the Kleinschmidt and Duer judgments. * My conversation with Dunphy was with a view to settlement."—(49.)

E. Terrell, p. 48 and 40, deputy sheriff, says:

"Morse had a good deal of property on the ranch. I think I could have collected the Kleinschmidt and Duer execution if it had not been for the mortgage."—(p. 48 and 40.) "I was then deputy sheriff of Gallatin county. I know that at the time, January 1, 1868, I could have collected the entire amount, even at a forced sale, if the property of Morse had not been encumbered by the mortgage of Dunphy."—(40.)

M. O. Codding, commissary, (p. 41,) paid Dunphy, after January, 1868, for fresh beef about $4,500.

C. W. Moffitt, (p. 49,) who was deputy sheriff, sustains the statement made by George in all its particulars.

V. Dunphy's statements and conduct fully implicate him with the Morses, so that their declarations are evidence against him.

H. Kirkendall, (p. 37,) says Dunphy told him he expected to get some of the $9,000 the Morses were to receive.

Wm. Herron, (p. 30.) Dunphy told him of the sale of goods for 1,000 sacks of flour, to be delivered by January 1, 1868, at Helena.

John W. Grannis, miller at Madison Mills, says Dunphy was present with the Morses there while the work was going on heavily.—(p. 38–39.)

Anders (p. 40) was clerk for Dunphy in 1867, and present when the contract with the Morses was made; this was the evening before the Morses left town for Gallatin.

Jos. S. Wilson, (p. 44,) *one of Dunphy's securities*, speaks of conversation chiefly with the Morses, but "*Dunphy* there told me I had better settle up my matters before

the sheriff levied on everything; this was the middle of January. *Morse* was there and urged me to give my note so as to effect a settlement, and thus get the account off the books, and he, *Morse*, would make the matter right at a future time. He drew my note payable to Dunphy."—(p. 44.) * * "Hard to tell whose property it was at that time."—(p. 44.) I told B. Morse "I thought he was taking desperate chances in the way he was doing his business. He answered that he was bound to have a friend; that he must trust somebody." * * * "Dunphy told me he had bought everything."—(p. 45.)

A. George, (p. 48.) Had conversation with Dunphy December 20, 1867, who showed me the mortgage. He told me it was for $10,000 worth of goods, *to be paid in flour*. This shows Dunphy spoke of the flour contract as then in force.

J. W. Moffitt, (p. 50.) On 10th January, 1858, coming back from Helena, I stopped at Morse's store over night. Morse and Sill and Dunphy were there. Morse was selling goods, and had charge of the store.—(p. 49.) I had made arrangements with Dunphy to fill his beef contract at Fort Ellis, and I applied to Dunphy for cattle, and received from him an order for them on Morse, and Morse delivered me ten head at the ranch. My partner, Geo. Dow, and myself agreed to take Dunphy's beef contract with Fort Ellis off his hands, and he, Dunphy, was to furnish his beef to fill this contract at Morse's store or ranch.

VI. *Full equitable relief entitled the appellees to the decree rendered for the amount of their judgment.*

Equity having acquired jurisdiction of this case, to set aside the mortgage as fraudulent, to save multiplicity of suits, will make such decree as will do full justice between the parties, and therefore should give judgment against Dunphy for the full amount of the debt.

Story's Eq. Jur., sec. 68, says especially should this power be exercised in case of fraud. See id., 68, 69, 70,

71. Also, 2 Story Eq., sec. 794, 799, on Compensation and Damages; Jesus College vs. Bloome, 3 Atkyns, 263; Carlisle vs. Wilson, 13 Vesey, 278; Franklin vs. Green, 2 Allen, Mass., 519.

Sec. 147, page 167, of Practice Act of 4th Assembly says "the court may grant any relief consistent with the case made by the complaint and embraced within the issue."

F. A. DICK,
Of Counsel for Appellees.

March, 1871.

11.

Exhibit 98

11 Feb 1871

Judgment rendered
in the answer -
to all

answer set up
pending suit -
to defend -

14 Pork 259
1 Bag Feathers 274
10 Flour 68
Whiskey
9 Wall 369
14 Flour
8 Wall - 370
1 Wall